TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 205.

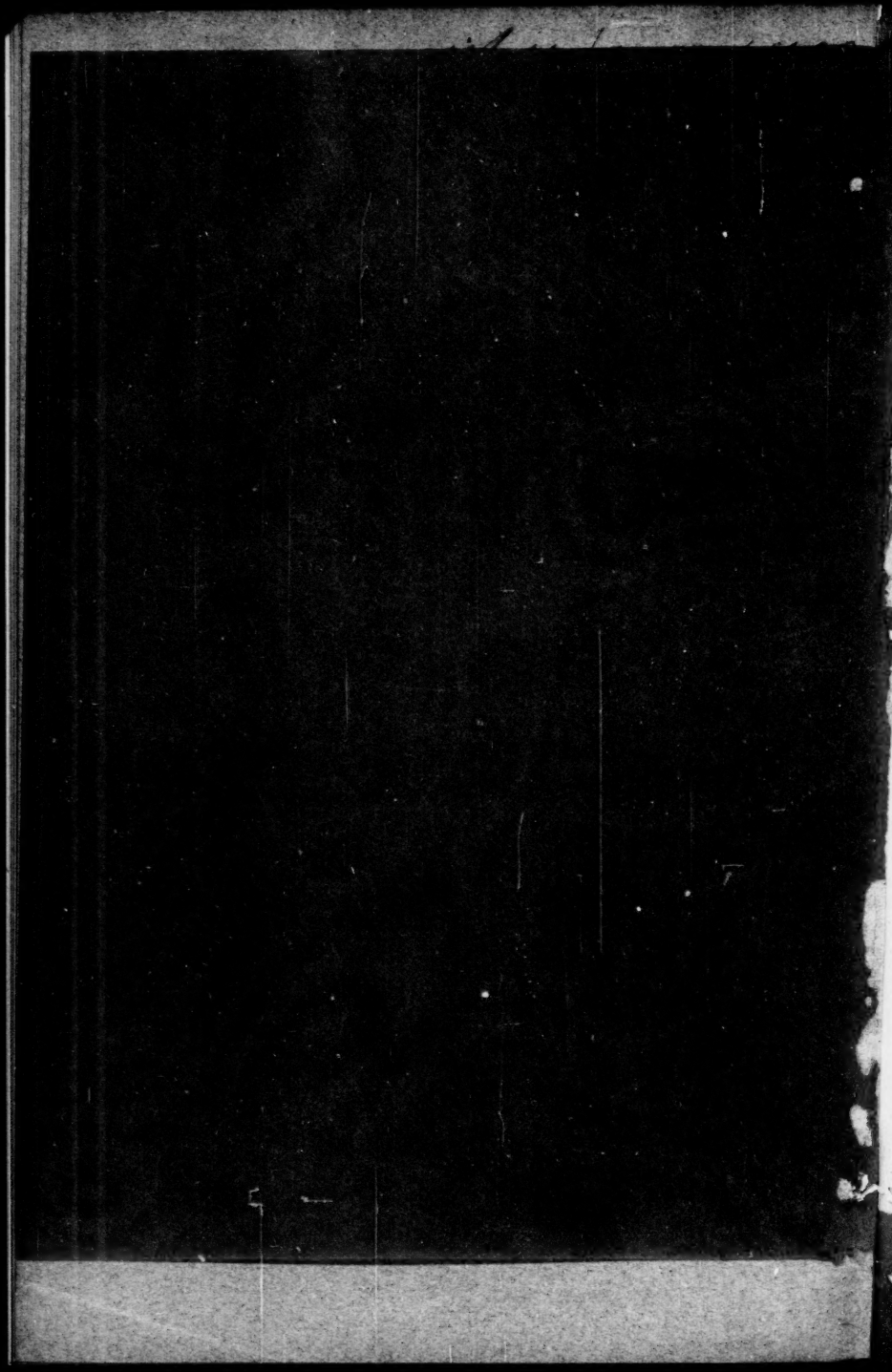
HENRY W. HOWELL ET AL., APPELLANTS,

vs.

RUFUS Y. McADEN, THOMAS S. LUTTERLOH, HENRY V. ROGERS, THE WESTERN RAILROAD COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

FILED OCTOBER 21, 1874.



SUPREME COURT OF THE UNITED STATES.

No. 205.

HENRY W. HOWELL ET AL., APPELLANTS,

vs.

RUFUS Y. McADEN, THOMAS S. LUTTERLOH, HENRY V. ROGERS, THE WESTERN RAILROAD COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

INDEX.

	Original.	Print.
Style of cause and prosecution-bond	1	1
Bill of complaint	2	1
Order for injunction upon filing bond	26	10
Exhibit A filed with bill of complaint	27	10
Exhibit B referred to in the bill	28	10
Subpœnas	51	19
Appearances of defendants	53	20
Answer of the Western Railway Company	53	20
Answer of John D. Williams, E. J. Lilly, A. A. McKeithan, and A. W. Steel	82	36
Answer of Henry Lilly	91	41
Answer of Isaac B. Grainger	94	42
Order vacating injunction	96	43
Order appointing commissioner	97	43
Further order to commissioner	98	44
Evidence taken before commissioner	99	44
Report of commissioner	176½	90
Exceptions thereto by complainant	192	99
Exceptions thereto by defendant	194	100
Cause set for hearing	196	100
Final decree	196	101
Appeal	197	101
Appeal-bond	198	101
Reference to acts of assembly referred to in Exhibit A	200	102
By-laws of Western Railroad Company	202	103
Clerk's certificate	206	104

1 UNITED STATES OF AMERICA,
Eastern District of North Carolina:
Circuit court, fourth district.

Be it remembered, that on the 6th day of May, A. D. 1873, Henry W. Howell, by his solicitors, Merrimon, Fuller and Ashe, filed his bill in the office of the circuit court of the United States for the eastern district of North Carolina, against Rufus Y. McAden, Thomas S. Lutterloh, Henry J. Rogers, The Western Railroad Company, John D. Williams, Henry Lilly, Edmond J. Lilly, Alfred A. McKeithan, Augustus W. Steel, and Isaac B. Grainger, and gave bond for the prosecution of his said suit in the words and figures following, to wit:

Circuit court of the United States for the eastern district of North Carolina. In equity.

HENRY W. HOWELL.
against
THE WESTERN RAILROAD COMPANY, JOHN D. Williams, Henry Lilly, E. J. Lilly, A. A. McKethan, Augustus W. Steel, Isaac B. Grainger.

We, and each of us, promise to pay to the defendants above
2 named the sum of three hundred dollars, to be void, nevertheless, upon the condition that we pay to the said defendants all costs and damages which may be adjudged to them by reason of failure to prosecute the above suit successfully.

Given under our hand and seals this 11th day of June, 1873.

HENRY W. HOWELL, [SEAL.]
By THOS. C. FULLER, *Atty.* [SEAL.]
C. J. ROGERS. [SEAL.]

Which said bill of complaint is in the words and figures following, to wit:

Circuit court of the United States for the eastern district of North Carolina.

HENRY W. HOWELL, ON BEHALF OF HIMSELF and all other holders of the first-mortgage bonds of "The Western Railroad Company, issued under authority of an act of the general assembly of North Carolina, entitled an act to enable the W. R. R. Company to complete its road from the coal-fields in Chatham County to some point on the North Carolina Railroad," ratified the 20th day of December, A. D. 1866, and under authority given by the stockholders of the Western Railroad Company, in general meeting assembled, on the 7th day of April, A.
3 D. 1870, who shall come in and contribute to the expenses of this suit,
against
RUFUS Y. MCADEN, THOMAS S. LUTTERLOH, Henry J. Rogers, The Western Railroad Company, John D. Williams, Henry Lilly, Edmond J. Lilly, Alfred A. McKeithan, Augustus W. Steel, and Isaac B. Grainger.

To the honorable the judges of the circuit court in and for the eastern district of North Carolina:

Henry W. Howell, a citizen and resident of the State of New Jersey,

brings this his bill, in behalf of himself and all other holders of the first-mortgage bonds of the Western Railroad Company, issued under authority of an act of the general assembly of North Carolina, entitled "An act to enable the W. R. R. Company to complete its road from the coal-fields in Chatham County to some point on the North Carolina Railroad," ratified the 20th day of December, A. D. 1866, and under authority given by the stockholders of the W. R. R. Company, in general meeting assembled, on the 7th day of April, A. D. 1870, who shall come in and contribute to the expenses of this suit, against Rufus Y. McAden, a citizen of Mecklenburg County, in the State of North Carolina; Thomas S. Lutterloh, a citizen of Cumberland County, in the
4 State of North Carolina, in said eastern district of North Carolina; Henry J. Rogers, a citizen of the State of New York, and resident in the city and county of New York; The Western Railroad Company, a corporation created and existing and acting under the laws of the State of North Carolina within the eastern dist. of N. C.; John D. Williams, Henry Lilly, Edmond J. Lilly, Alfred A. McKeithan, and Augustus W. Steel, the last-named five persons, citizens of the county of Cumberland, in the State of North Carolina, within the eastern district of North Carolina, and Isaac B. Grainger, a citizen of the county of New Hanover, in the State of North Carolina, and within the eastern district of said State.

And thereupon your orator complains and says, that the Western Railroad Company, the corporation defendant, was created and organized under an act of the general assembly of North Carolina, entitled "An act to incorporate a company to construct a railroad from some point on the Cape Fear River, at or near Fayetteville, to some point in the coal-reig'ons hereafter to be determined," ratified the 24th day of December, A. D. 1852, and various acts of the general assembly amendatory thereof, all of which said acts your orator is ready to pro-
5 duce whenever required so to do.

That, under and by virtue of said acts, the termini of said Western Railroad have been fixed at Fayetteville, on the Cape Fear River, as the eastern terminus, and Greensboro, in the county of Guil*d*ford, as the western terminus; that about 43 miles of said road have been built and operated by said company, to wit, from Fayetteville to Egypt, in the coal-fields, in the county of Chatham, in the State of North Carolina, for a long period, that is to say, for eight years or mo*o*re.

And your orator further says that on the 20th day of December, A. D. 1866, an act of the general assembly of the State of North Carolina, entitled "An act to enable the *the* Western Railroad Company to complete its road from the coal-fields in the county of Chatham to some point on the North Carolina Railroad," was ratified, an exemplified copy of which act your orator hereto annexes, and prays may be taken as part of this his bill. That by this last-mentioned act authority is given to the said Western R. R. Company, and it is thereby empowered, to issue mortgage-bonds of said company, not exceeding in amount 900,000 dollars, at a rate of interest not exceeding eight per cent. per annum, and to secure the payment of said bonds, to make a mortgage
6 upon the railroad of said company, and all its property and income, in such manner and form as they may determine; that said bonds, to be secured by mortgage, were to be issued and negotiated to enable the said Western R. R. Company to raise the money to construct and extend its road to some point on the North Carolina Railroad, at such point as might thereafter be selected by the Western R. R. Company, or by the president and directors of the same; which point was

afterwards, but before the issuing of the said bonds and the making of the said mortgage, selected and determined, to wit, the town of Greensboro, in the county of Guilford, in the State of North Carolina.

Your orator further shows that on the 7th day of April, A. D. 1870, the Western Railroad Company, in pursuance of authority conferred in said last-mentioned act, by a resolution of its stockholders, in general meeting assembled, directed the bonds of said company, to amount not exceeding nine hundred thousand dollars, to be issued, and a mortgage to be made to secure the same, a copy of which resolution is hereto appended, marked "A," and prayed to be taken as part of this bill.

And your orator further shows that on the 31st day of October, A. D. 1870, the Western Railroad Company, the defendant corporation,
7 did issue its coupon-bonds to the number of nine hundred, each for the sum of one thousand dollars, with interest at the rate of eight per cent. per annum—the principal payable at the end of thirty years, and the interest payable semi-annually, to wit, on the 1st day of November and the first day of May in each and every year, both principal and interest payable at the National Bank of the Republic in the city of New York. And on the said 31st day of October, A. D. 1870, the said Western Railroad Company did make its mortgage-deed to secure the payment of said bonds to the defendants, Rufus Y. McAden, Thomas S. Lutterloh, and Henry J. Rogers, a copy of which, marked "B," is hereto appended, and prayed to be taken as part of this bill.

That by the said mortgage-deed it is provided that, upon a failure to pay the interest according to the tenor of the coupons of said bonds, upon demand, at the place of payment, and if such default shall continue for the period of six months, then the principal of said bonds shall be and become absolutely and instantly due. And it is further in said deed provided that until default as therein specified, by doing or omitting to do some act therein prohibited or directed, the West-
8 ern Railroad Company, the corporation defendant, shall use, occupy, and possess all the property, rights, &c., conveyed in said deed. And your orator further shows that in case default is made in the p yment of any instalment of interest as herein and in said deed set forth, (to wit, articles 2 and 3 of said deed,) authority is given to said McAden, Lutterloh, and Rogers, trustees, their successors and assigns, to enter and take possession of said property and rights conveyed, and to sell the said railroad and all property and rights conveyed to them by said deed, as therein set forth.

And your orator further shows that it is made the duty of said trustees to exercise the powers conferred by articles 2 and 3, if default shall be made in the payment of principal or interest of said bonds, upon the requisition in writing of any bondholder, as set forth in article seven of said deed of mortgage.

And your orator further shows that he is the bona-fide holder of five (5 of said bonds, issued October 31st, 1870, each of the amount of one thousand dollars, and numbered as follows: No. 36, 37, 38, 39, and 40, with all the coupons for interest thereon, all of which said bonds, with all of their said coupons, attached and unattached, your orator
9 has now in his possession, and has had in his possession since shortly (say two months) after their issue, and is ready to produce, as your honors may direct.

And your orator further shows that on the 6th day of November, A. D. 1871, he caused to be presented to the National Bank of the Republic, in the city of New York, coupons on said bond No. 38, and de-

manded payment of the same, and that payment thereof was then and there refused, with the answer, "No funds;" and your orator charges that neither the said Western Railroad Company nor said trustees have ever had at the National Bank of the Republic, in the city of New York, any funds with which to pay the interest on said bonds or any of them.

And your orator further shows that he has notified said McAden, Lutterloh, and Rogers, trustees, of the default made in the payment of the coupons for interest on said bonds as aforesaid, and that said default had then continued for a period of six months; and has made the requisition in writing provided for in the 7th article of said deed of mortgage, and has demanded that they should at once exercise the rights, powers, and duties conferred and imposed on them by said deed of mortgage, and has tendered the indemnity therein required, and with such demand the said McAden, Lutterloh, and Rogers, trustees, and each of them, have utterly failed and refused to comply, saying that they would only act in the premises under the order and mandate of a court of competent jurisdiction.

And your orator further shows unto your honors that, since the time of the issuing of the said bonds and the execution of the said deed of mortgage, the said Western Railroad Company have remained in possession of the railroad and other property conveyed by said deed, operating the said railroad and using the said other property, real and personal, and have made large sums of money thereby, none of which has been applied to the payment of interest on said mortgage-bonds, as it should have been, but has been used in the payment of officers' salaries, running expenses, and in the other manners hereinafter set forth.

Your orator further shows that, during the year A. D. 1871, the affairs of said railroad company were managed by a president, one L. C. Jones, and a board of nine (9) directors, five of whom were elected by individual stockholders, and four were appointed by the proxy of the State of North Carolina; that the said individual stockholders elected as directors the defendants, John D. Williams, Edmond J. Lilly, Alfred A. McKeithan, and Augustus W. Steel, and also one Murdoch McKinnon, not made defendant, and the State proxy appointed as directors W. A. Guthrie, E. S. Pemberton, John Reilly, and James R. Lea. That on the 5th day of June, A. D. 1871, the Western Railroad Company suffered judgment to be entered against it in the suit of Mathew Baird, surviving partner of M. W. Baldwin & Co., against the Western Railroad Company, in the circuit court of the United States for the district of North Carolina, for a large amount, to wit, for twenty-nine thousand five hundred and ten $\frac{46}{100}$ dollars, with interest on $22,399.69 from said 5th day of June, 1871, till paid, and costs, $125.93; all of which appears of record in said court, which record your orator stands ready to produce, as your honors may direct. And your orator is informed and believes that the Western Railroad Company had a good defence to said action, which they did not attempt to prove under their pleas; and, further, that said company could have saved much money by acceding to propositions of compromise made by said plaintiff before judgment was rendered.

Your orator further shows that a writ fieri facias was issued on said judgment, returnable to fall term, 1871, and returned "Too late to hand;" that another writ of fieri facias was issued January 11th, A. D. 1872, returnable to spring term, 1872, and was levied on the railroad of the defendant corporation, and all of the property which could be levied on, embraced in the deed of mortgage aforesaid.

That said fi. fa. with the levy endorsed was returned July 22d, 1872, and that shortly afterwards the defendants, John D. Williams, Edmond J. Lilly, Alfred A. McKeithan, and Augustus W. Steel, then members of the board of directors of the Western Railroad Company, purchased the said judgment of Baird, surviving partner, against the Western Railroad Company, and took an assignment thereof to themselves, upon the condition and with the express stipulation and agreement that the Western Railroad Company should pay them interest at the rate of one and one-half per cent. per month, or eighteen per cent. per annum, upon the money they paid for the purchase of said judgment.

And your orator avers that under this agreement the Western Railroad Company has paid to said John D. Williams, Edmund J. Lilly, Henry Lilly, Alfred A. McKeithan, and Augustus W. Steel large sums of money as the interest at the usurious rate aforesaid.

Your orator alleges that the defendant Henry Lilly, though not a director, is the brother of Edmund J. Lilly, who was a director.

And your orator further shows that during the years 1871 and 1872, the Western Railroad Company has purchased passenger-coaches and other rolling-stock for said road, and have taken the title there-
13 for to the defendants John D. Williams, Edmund J. Lilly, Henry Lilly, Alfred A. McKeithan, and Augustus W. Steel.

And your orator further shows that at the time of making the mortgage-deed aforesaid the Western Railroad Company was the owner of and conveyed by said mortgage-deed to the defendants McAden, Lutterloh, and Rogers, trustees, second-mortgage coupon-bonds of the Wilmington, Charlotte and Rutherford Railroad Company, of the par value of five hundred thousand dollars, and that said bonds have been assigned to the defendant Isaac B. Grainger, without value; and that said Grainger has agreed to receive for said bonds the sum of seventeen thousand dollars, and to deliver them to the purchaser; and that said bonds are so assigned and to be transferred by the action of the Western Railroad Company without the consent of said trustees.

To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, that is to say, Rufus Y. McAden, Thomas S. Lutterloh, Henry J. Rogers, John D. Williams, Edmund J. Lilly, Henry Lilly, Alfred A. McKeithen, Augustus W. Steel, and Isaac B. Grainger, upon their several respective corporal oath, and the Western Railroad Company, under the seal of the corporation and according to the best of their several and re-
14 spective knowledge, information, remembrance, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer, that is to say:

First. Whether the company defendant is not a corporation created by act of the general assembly of North Carolina as herein set forth?

Second. Whether the termini of the Western Railroad have not been fixed at Fayetteville and Greensboro'; and, if not, where are the termini?

Third. Whether about forty-three miles of the Western Railroad have not been built and operated by said company for a long time; if yea, for how long a time?

Fourth. Whether an act of the general assembly, entitled "An act to enable the Western Railroad Company to complete its road from the coal-fields in Chatham County to some point on the North Carolina Railroad," ratified the 20th day of December, A. D. 1866, was not so ratified, and duly accepted by the Western Railroad Company?

Fifth. Whether power and authority was not given to said Western

Railroad Company by said act to issue bonds to the amount of nine hundred thousand dollars, with interest not to exceed eight per cent. per annum, and to make a mortgage on the said railroad and any and all of its property or income to secure the payment of such bonds?

15 Sixth. Whether the stockholders of the Western Railroad Company in general meeting assembled did not authorize and direct the issuing of the coupon-bonds of said company to the amount of nine hundred thousand dollars, bearing interest at the rate of eight per cent. per annum, and also direct the making of a mortgage to secure the same? Whether such authority and direction were not emboddied in a resolution of the date of 7th day of April, A. D. 1870? If yea, set forth a copy of such resolution.

Seventh. Whether such mortgage was not made, and the copy thereof hereto annexed is not a true copy?

Eighth. Whether the Western Railroad Company did not issue its bonds in accordance with the act of the general assembly aforesaid, and the resolution of the stockholders aforesaid, and according to the recitals of the said mortgage-deed?

Ninth. Whether at any time since the issuing of said bonds any funds have been provided and placed with the National Bank of the Republic, of the city of New York, to pay the interest or any part thereof on said bonds, either by the Western Railroad Company, or the trustees under said mortgage, or any other person?

Tenth. Whether your orator is not the bona fide owner and holder of five of said bonds, each for one thousand dollars, with all the

16 coupons for interest accrued and to accrue thereon?

Eleventh. Whether your orator did not demand payment of the coupons for interest on said bond, No. 38, at the National Bank of the Republic, in the city of New York, on the 6th day of November, A. D. 1871?

Twelfth. Whether payment of said interest was not refused by the National Bank of the Republic, of the city of New York, for the want of funds with which to pay the same?

Thirteenth. Whether your orator did not notify the trustees, Rufus Y. McAden, Thomas S. Lutterloh, and Henry J. Rogers, that he was the holder of bond No. 38, (of said bonds,) and that default had been made in the payment of interest thereon, according to the tenor of the coupons thereon, presented to the National Bank of the Republic, in the city of New York, on the 6th day of November, A. D. 1871; and that such default had continued for the period of six calender months.

Fourteenth. Whether your orator did not thereupon make the requisition in writing upon said McAden, Lutterloh, and Rogers, trustees, that they should enforce the rights of your orator by entry, sale, or suit or suits at law or in equity as such trustees, being advised by counsel, should deem most expedient for the interests of your orator, and the other holders of said mortgage bonds? And whether your orator did not at the same time offer to indemnify said McAden,

17 Lutterloh, and Rogers, trustees, against all costs and expenses to be by them incurred?

Fifteenth. Whether said McAden, Lutterloh, and Rogers, trustees, did not reply to such requisition, that they and each of them declined to take any action except such as they should be compelled to take under the order or mandate of a court of competent jurisdiction, or to that effect?

Sixteenth. Whether, since the execution of said deed of mortgage, the Western Railroad Company has not remained in possession of the

railroad and other property, real and personal, therein conveyed? Whether such company defendant has not operated said road, and used the said other property, and made large sums of money thereby? What has been the receipts; what the disbursements; on what account; and whether any portion of said receipts have been applied to the payment of the principal and interest of said mortgage-bonds?

Seventeenth. Whether, during the year 1871, the defendants, John D. Williams, Edmund J. Lilly, Alfred A. McKeithan, and Augustus W. Steel, were not directors, elected by the individual stockholders in the Western Railroad Company; when their time of service commenced, and when it ended, and who were the other directors in said company during the year 1871, and how elected or appointed?

18 Eighteenth. Whether the Western Railroad Company was not sued in the circuit court of the United States for the district of North Carolina, by Matthew Baird, surviving partner of M. W. Baldwin & Co., for a large amount, and whether said suit was pleaded to fully, and whether the said company did not have a good defence thereto, which it failed and declined to prove?

Nineteenth. Whether the plaintiff in said suit did not offer to abate a large sum from his demand before judgment; and, if so, how much; and whether the Western Railroad Company did not decline to acceed to said proposition?

Twentieth. Whether judgment was not entered against the defendant, the Western Railroad Company, in said suit of Baird, surviving partner of M. W. Baldwin & Co., at June term, 1871, of the United States circuit court for the district of North Carolina for $29,510.46, with interest on $22,399.69, from June 5th, 1871, and for costs $125.93?

Twenty-first. Whether said judgment was not purchased by and assigned to the defendants John D. Williams, Edmund J. Lilly, Henry Lilly, Alfred A. McKeithan, and Augustus W. Steel; at what time, and for how much money?

Twenty-second. Whether the Western Railroad Company did

19 not agree to pay to said John D. Williams, Edmund J. Lilly, Henry Lilly, Alfred A. McKeithan, and Augustus W. Steel, interest at the rate of one and one-half per cent. per month, on the money paid for the purchase of said judgment; if not, what was the rate to be paid? How much has been paid in pursuance of said agreement; when paid, and by whom?

Twenty-third. How much of the amount so paid for the purchase of said judgment has subsequently been paid to John D. Williams, Edmund J. Lilly, Henry Lilly, Alfred A. McKeithan, and Augustus W. Steel, or either of them; when paid, how paid, and by whom paid?

Twenty-fourth. State particularly and circumstantially all about the purchase of said judgment, how paid for, and all about it.

Twenty-fifth. Whether any passenger-coaches or other property, rolling-stock, or, &c., used about the Western Railroad has been bought since February, 1871? If so, what; for how much; how was it paid for; and in whose name was the title taken? If the title was taken in the name of others than the Western Railroad Company, why was this done? and particularly set forth the transaction.

Twenty-sixth. Whether at the time of making the mortgage herein spoken of, the Western Railroad Company did not own five hun-

20 dred thousand dollars or more of the second-mortgage bonds of the Wilmington, Charlotte and Rutherford Railroad Company? If yea, whether they were not conveyed by said deed of mortgage to defendants McAden, Lutteroh, and Rogers?

Twenty-seventh. Whether said second-mortgage bonds of the Wilmington, Charlotte and Rutherford Railroad Company have not been transferred by the Western Railroad Company, without the assent of said McAden, Lutteroh, and Rogers, trustees, to the defendant, Isaac B. Grainger? Whether said transfer was for value, and whether said Grainger has not agreed to dispose of the same for seventeen thousand dollars, or some other amount?

And that it may be decreed and declared by your honors, that Rufus Y. McAden, Thomas S. Lutterloh, and Henry J. Rogers, trustees, sell the Western Railroad, and all the other property, real and personal, rights and franchises, conveyed to them by the Western Railroad Company, by its deed of mortgage of the date of October 31st, A. D. 1870, at such time and on such terms as your honors may direct, and out of the proceeds of sale, after deducting necessary expenses, to pay to your orator and such other holders of the mortgage-bonds of the Western-

Railroad Company as may come in and contribute to the ex.
21 penses of this suit, the interest and principal upon their said bonds,

And that an account may be taken, by and under the direction and decree of your honors, of the operations of the company defendant, from the 31st day of October, A. D. 1870, and of the dealings between the Western Railroad Company and defendants John D. Williams, Edmund J. Lilly, Henry Lilly, Alfred A. McKeatham, and Augustus W. Steel, or either of them, concerning the purchase of the Baird judgment, the purchase of passenger-coaches and other property used by the Western Railroad Company, and also an account of any dealing or transactions, with regard to the second-mortgage bonds of the Wilmington, Charlotte and Rutherford Railroad Company, between the Western Railroad Company and the defendant Isaac B. Grainger.

And that a proper person may be appointed by your honors to take and receive into his possession the Western Railroad, and all of the other property embraced or intended to be embraced in the deed of conveyance of the Western Railroad Company to Rufus Y. McAden, Thomas S. Lutterloh, and Henry J. Rogers, and to operate and dispose of said railroad and other property in such manner as your honors may direct.

And that in the mean time, and until the further order of a de-
22 cree of your honors, the Western Railroad Company, its officers, directors, and servants, may be restrained by the order and injunction of your honors from selling or otherwise disposing of the property in its possession or under its control, embraced or intended to be embraced in the deed of mortgage to Rufus Y. McAden, Thomas S. Lutterloh, and Henry J. Rogers, dated October 31st, 1870, and from paying to the defendants John D. Williams, Edmund J. Lilly, Henry Lilly, Alfred A. McKeithan, and Augustus W. Steel any sum or sums of money on account of the principal or interest on the amount paid on account of the purchase of the judgment in the circuit court of the United States for the district of North Carolina of Baird, surviving partner, against the Western Railroad Company.

That the defendants John D. Williams, Edmund J. Lilly, Henry Lilly, Alfred A. McKeithan, and Augustus W. Steel may be restrained and enjoined from selling or disposing of any of the passenger-cars or other rolling-stock or other property used by the said Western Railroad Company, purchased since the 31st day of October, A. D. 1870, the title to which has been taken in the name of said John D. Williams, Edmund J. Lilly, Henry Lilly, Alfred A. McKeithan, and Augustus W. Steel.

And that the defendant Isaac B. Grainger may be restrained and

23 enjoined from proceeding in the sale, assignment, negotiation, or transfer of the 2d-mortgage bonds of the Wilmington, Charlotte and Rutherford Railroad Company, which were received by him from the Western Railroad Company.

And your orator further prays for such other and further relief as will secure to him, and such other bondholders, as aforesaid, who may come in and contribute to the expenses of this suit, their just rights in the premises, as equity and good conscience may require and to your honors may seem meet.

May it please your honors to grant unto your orator not only a writ of injunction, conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the Western Railroad Company, Rufus Y. McAden, Thomas S. Lutterloh, Henry J. Rogers, John D. Williams, Edmund J. Lilly, Henry Lilly, Alfred A. McKeithan, Augustus W. Steel, and Isaac B. Grainger, commanding them to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to your honors shall seem meet and be required by the principals of equity and good conscience.

And your orator will ever pray, &c.

MERRIMON, FULLER & ASHE,
Solicitors for Complainant.

24 Of the foregoing interrogatories, the first, second, third, seventh, ninth, and tenth are to be answered by all of the defendants, except alone Isaac B. Grainger.

The fifth and sixth are to be answered by all the defendants except Rufus Y. McAden, Henry J. Rogers, and Isaac B. Grainger. The twenty-second, twenty-third, twenty-fourth, and twenty-fifth are to be answered by all the defendants, except Rufus Y. McAden, Henry J. Rogers, Thomas S. Lutterloh, and Isaac B. Grainger.

The fourth, sixteenth, eighteenth, and nineteenth are to be answered by Western Railroad Company alone.

The fourteenth, thirteenth, and fifteenth are to be answered by Henry J. Rogers, Rufus Y. McAden, and Thomas S. Lutterloh, alone.

The eighth, eleventh, and twelfth are to be answered by the Western Railroad Company, Henry J. Rogers, Rufus Y. McAden, and Thomas S. Lutterloh.

The seventeenth is to be answered by the Western Railroad Company, John D. Williams, E. J. Lilly, A. A. McKeithan, and Augustus W. Steel.

The twentieth is to be answered by the Western Railroad Company, John D. Williams, E. J. Lilly, A. A. McKeithan, and A. W. Steel.

The twenty-first is to be answered by the Western Railroad
25 Company, John D. Williams, E. J. Lilly, Henry Lilly, A. A. McKeithan, and A. W. Steel.

The twenty-sixth is to be answered by the Western Railroad Company and Thomas S. Lutterloh.

The twenty-seventh is to be answered by the Western Railroad Company, Henry J. Rogers, Rufus Y. McAden, Thomas S. Lutterloh, and Isaac B. Grainger.

MERRIMON, FULLER & ASHE,
Solicitors for Complainant.

Henry W. Howell, complainant, makes oath that the matters set forth in the foregoing bill as of his own knowledge are true; those otherwise stated he believes to be true.

H. W. HOWELL.

Sworn to and subscribed before me at Baltimore, Maryland, this third day of May, A. D. 1873.

Sworn before

HUGH L. BOND,
Ct. Judge.

26 UNITED STATES OF AMERICA.

Circuit court for the 4th circuit, eastern district of North Carolina.

Upon reading the foregoing bill of complaint, verified by the affidavit of Henry W. Howell, complainant, and upon the motion of counsel, it is ordered by the court that the clerk of the circuit court for the eastern district of North Carolina issue the writ of subpœna as prayed for in the said bill, returnable according to law. It is further ordered that upon the complainant giving bond with approved security in the sum of ten thousand dollars, conditioned to indemnify the defendants against loss by reason of the wrongful issuing of the injunction, the said clerk do issue the writ of injunction as prayed for in said bill; with leave to said defendants to move dissolve said injunction on the first Monday in June, A. D. 1873, or as soon before as said motion can be heard.

HUGH L. BOND,
Ct. Judge.

BALTIMORE, MD., *May* 3, 1873.

27 *Exhibit A, filed with bill of complaint.*

Resolved, That to enable the Western Railroad Company to raise the money necessary to construct and extend said road to some point on the N. C. R. R., the president and directors of the said W. R. R. Co. are hereby authorized and empowered to issue the mortgage-bonds of said company in sums of not less than one hundred dollars each, payable in thirty (30) years from the date thereof, with coupons of interest attached, payable semi-annually, at a rate of interest not exceeding eight per cent. per annum, both principal and interest payable at the Bank of the Republic, in the city of New York, or at the office of the company in Fayetteville: Further resolved, That to secure the payment of said bonds the president and directors of said Western R. R. Co. may make a mortgage upon said railroad, with all its property now held by said company or hereafter to be acquired, and the said mortgage, signed by the president and countersigned by the secretary and treasurer, under seal of the corporation, shall be valid and binding from the time it shall be registered in the county of Cumberland.

28 *Exhibit B, referred to in the bill.*

This indenture, made this 31st day of October, 1870, between the Western Railroad Company, incorporated under and by virtue of the laws of the State of North Carolina, of the first part, and Thomas S. Lutterloh and Rufus Y. McAden, of the State of North Carolina, and Henry J. Rogers, of the city and State of New York, of the second part, witnesseth: That whereas, in pursuance of the powers and authorities in it duly vested, and for the purpose of completing its said road from Egypt, in the county of Chatham, in the State of North Carolina, to the North Carolina Railroad, at Greensboro', in the county of Guildford in said State, the said Western Railroad by its stockholders in general meeting assembled, resolved to issue and negotiate its bonds to amount in all to the sum of nine hundred thousand dollars, in the money of the

United States of America, which bonds are to be equally and fully secured by these presents, and are all of like tenor and in the form following:

"UNITED STATES OF AMERICA,
"*State of North Carolina:*

"The Western Railroad Company hereby promise to pay to the bearer hereof, at the National Bank of the Republic, in the city of New York, on the first day of November, in the year 1900, and upon the sur-
29 render of this bond, the sum of one thousand dollars lawful money of the United States, together with interest thereon, at the rate of eight per ct. per annum, in like lawful money, payable semi-annually, on the first days of May and November, in each and every year, at the bank aforesaid, on the surrender of the coupons hereto annexed, representing the said interest, until the full principal sum is paid as aforesaid. In case of the non-payment of any coupons in full upon the presentation and demand of payment thereof, when due, at the said bank, and default of payment thereby shall continue for six months after such presentation and demand, then the principal of this bond shall become due and payable, as provided in the deed of trust or mortgage made to secure the payment thereof, as though the whole period of thirty years had elapsed. This bond is one of a series of nine hundred, each for a like sum, numbered from one to nine hundred inclusive, issued by the said Western Railroad Company, to pay the indebtedness of said company, created in the construction of this road, which bonds are equally secured by a first mortgage on the road, rolling-stock, station-houses, machine-shops, and all other property and appurtenances belonging to said company, as now owned, or hereafter to be acquired, as will appear on reference to said deed, bearing date 31st day of October, 1870, and registered in the county of Cumberland, in the State of North Carolina.

30 "In witness whereof the said company has caused its corporate seal to be hereto affixed, and the same to be attested by the signature of its president and secretary; and has also caused the coupons hereto annexed to be signed by its secretary, this 31st day of October, 1870.

"*Secretary.* "*President.*

"The Western Railroad Company will pay forty dollars to bearer, at the National Bank of the Republic, in the city of New York, on the first day of May, 1871, for six months' interest, due on bond No. .

"*Secretary.*"

And printed on the back of said bond as follows:

"An act to enable the Western Railroad Company to complete its road from the coal-fields in Chatham County to some point on the North Carolina Railroad.

"SEC. 3. Be it further enacted, That to enable such company to raise the money necessary to construct and extend said road to some point on the North Carolina Railroad, to connect with said road at such point as may be selected by the Western Railroad Company, or by the president and directors of the same, that said president and directors are hereby authorized and empowered to issue the mortgage-bonds of said

31 company, in sums of not less than one hundred dollars each, and not exceeding in amount nine hundred thousand dollars, and to be negotiated at not less than par, and not to mature at an earlier period than thirty years, in sums of not less than one hundred dollars each, payable at such time and place, and at such rate of interest, not to exceed eight per cent., and to secure the payment thereof, may make a mortgage upon the railroad, and any and all of its property or income, in such manner and form as they may determine."

"This act ratified 20th Dec'r, 1866."

Now, therefore, this indenture witnesseth, that for and in consideration of the premises, and of the sum of one dollar to it duly paid by the said parties of the second part, and in order to secure the payment of the principal and interest of the said bonds, according to the tenor thereof, and of the coupons thereto annexed, the said Western Railroad Company, the party of the first part hereto, has granted, bargained, and sold, and by these presents does grant, bargain, sell, convey, and transfer unto the said parties of the second part, and their heirs and assigns, all and singular, the railroad of the party of the first part, or which the said party of the first is by law authorized to construct, being the line of railroad heretofore known or hereafter to be known as the Western Railroad, as the same now is and hereafter shall be constructed,

32 extending from the town of Fayetteville, in the county of Cumberland, in the State of North Carolina, to the North Carolina Railroad, in the town of Greensboro', in the county of Guildford, in the State aforesaid, including all the railways, branches, ways, rights of way, depot-grounds, and all lands in any manner or way belonging thereto or connected therewith, and all tracks, bridges, viaducts, fences, and other structures, depots, station-houses, engine-houses, warehouses, car-houses, freight-houses, wood-houses, sheds, and other buildings, and all machine-shops and other shops, held or acquired, or hereafter to be held or acquired, by the said company, its successors or assigns, for use in connection with the railroad of the party of the first part, or any part thereof, or with the business of the same, and including also all locomotives, steam-engines, tenders, cars, coaches, and other rolling-stock or equipment, and all stationary engines, machinery, tools, implements, fuel, and material for constructing, operating, repairing, or replacing the said railroad, or any part thereof, or any of the equipments or appurtenances of the said railroad, or any part thereof, and all the machinery of all kinds in the different shops belonging to the said Western Railroad Company, iron, and iron castings, bellows, anvils, tools, and materials of all kinds, copper flues, composition, cast steel, brass, paints,

nails, coal, lumber, zinc, and all and singular the other personal

33 property of any nature, kind, and description whatever, belonging to the said Western Railroad Company, and all the real estate of ev'ry kind, belonging to the said Western Railroad Company, wheresoever the same may be situated; and also all franchises connected with or relating to the said railroad or to the construction, maintainance, or use of the said railroad, and all the property, franchises, rights, and things of whatsoever name or nature, now held or hereafter to be acquired by the said party of the first part or its successors, together with all and singular the tenements, hereditaments, and appurtenances to the said railroad, lands and premises, or either thereof, belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, toll, incomes, revenues, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party

of the first part of, in and to the same, and any and every part thereof, with the appurtenances:

To have and to hold the above mentioned and described railroad branches, real estate, personal property, and premises, with the appurtenances, unto the said parties of the second part, and their heirs and assigns. In trust, nevertheless, for the purposes herein expressed, viz:

34 First. Article first. Until default shall be made by the said party of the first part, its successors or assigns, in the payment of the principal or interest, or some part thereof, of the said bonds, or some one of them, or some other requirements hereof, the said party of the first part, its successors and assigns, shall be suffered and permitted to possess, manage, operate, and enjoy the said railroad, with its equipments and appurtenances, and also the lands and premises, property, and franchises hereinbefore described, and to receive tolls and use the tolls, incomes, revenues, rents, issues, and profits thereof in the same manner and with the same effect as if this mortgage had not been made.

Second. Article second. In case first default shall be made in the payment of any interest or any of the said bonds according to the *the* tenor thereof, or to the coupons thereto annexed, or in the payment of any part of the principal of said bonds, or any of them, when the same shall have become due, and that any such default shall continue for the period of six months, or, secondly, in case default shall be made in the performance or observance of one or other requirements hereof, and that such last-mention' default shall continue for the period of six months, then in either of such cases it shall be lawful for the said parties of the second part, personally or by their attorneys or agents,

35 to enter into and upon all and singular the railroad, lands, and premises hereby conveyed or intended so to be, and each and every part thereof, and to have, hold, and use the same, operating by their superintendences, managers, receivers, or servants, or other attorneys or agents, the said railroads, and conducting the business thereof and making from time to time all repairs and replacements and such useful alterations, additions, and improvements thereto as may seem to them to be judicious, and to collect and receive all tolls, freights, incomes, rents, issues, and profits of the said railroad, land, and premises, and of every part and parcel thereof, and after deducting the expenses of operating the said railroad, and conducting the business thereof, and all expenses incurred in holding and management of said lands, and of all the said repairs, replacements, alterations, additions, and improvements, and all payments which may be made for taxes, assessments, charges, or *lein*s prior to the *lein* of these presents upon the said premises, or any part or parcel thereof, as well as just compensation for their own services, and for the services of such attorneys and counsel as may have been employed, to apply the moneys arising as aforesaid to the payment of the interest on the said bonds in the order in which such interest shall have been due, rateably to the persons holding the coupons, evidencing the right to such interest, and after paying all

36 the interest which shall have become due, to apply the said moneys to the payment of such of the said bonds as may be at that time unpaid, ratably and without discrimination or preference, and if after satisfaction thereof a surplus shall remain, to pay over such surplus to the said party of the first part, its successors or assigns, as any court of competent jurisdiction shall order.

Third. Article third. In case default shall be made as aforesaid, it

shall likewise be lawful for the said parties of the second part, or their successors, after entry as aforesaid, or other entry, or without entry, personally or by their attorneys or agents, to sell and dispose of all and singular the railroad's lands and premises hereby conveyed, or intended so to be, at public auction, in the town of Fayetteville, or in the town of Greensboro', as the said parties of the second part, or their successors, shall designate, and at such time as they may appoint, having first given notice of the place and time of such sale by advertisement, published not less than three times a week for six weeks, in one or more newspapers published in the State of North Carolina, and in the city of New York, and to adjourn the sale from time to time in their discretion, and, if so adjourning, to make the same without further notice at the time and place to which the same may be so adjourned; and to make and
37 deliver to the purchaser or purchasers of the said premises good and sufficient deed or deeds in law for the same and in fee-simple, which shall, made as aforesaid, *shall* be a perpetual bar, both in law and equity, against the said party of the first part, its successors and assigns, and all other persons claiming or to claim the said premises, or any part or parcel thereof, by, from, through, or under the said party of the first part, its successors or assigns, and after deducting from the proceeds of such sale just allowances for all expenses thereof, including attorneys and counsels, and all other expenses, advances, or liabilities, which may have been made or incurred by the said parties of the second part, in respect to the said lands, or any part or parcel thereof, or in operating or maintaining the said railroad, or any part thereof, or in managing the business thereof while in their possession, and in arranging for and completing the sale aforesaid, and all payments which may have been made by them for taxes or assessments, for charges or liens prior to the lein of these presents in the said premises, or any part thereof, as well as compensation for their own services, to apply the said proceeds to the payment of the principal of such of the said bonds as may be at that time unpaid, whether or not the same shall have previously become due, and of the interest which shall at that time have ac-
38 crued on the said principal and be unpaid, without discrimination or preference, but rateably to the aggregate amount of such unpaid principal, and accrued and unpaid interest, and if after payment of the same in full a surplus shall remain, to pay over such surplus to the said party of the first part or its successors, or render the same, as any court of competent jurisdiction shall order.

And it is hereby declared and agreed that the receipts of the said trustees shall be a sufficient discharge to the purchaser or purchasers of the premises which shall be sold as aforesaid for his or their purchase-money, and that such purchaser or purchasers, his or their heirs, executors, or administrators, shall not, after payment thereof, and having such receipt, be liable to see to the application of such purchase-money upon or for the purposes or trust of these presents, or be in any manner whatever answerable for any loss, misapplication, or non-application of such purchase-money, or any part thereof, or be obliged to inquire into the necessity, expediency, or authority of, or for, any such sale.

Fourth. Article fourth. At any sale of the aforesaid property, or of any part thereof, whether made by virtue of the power herein granted, or by judicial authority, the trustees may, in their discretion, bid
39 for the purchase, or cause to be bidden for and purchased, the property so sold, or any part thereof, in behalf of the holders of the bonds secured by this instrument, and then outstanding, in the proportion of the respective interests of such bondholders, at a reasonable price,

if but a portion of the said property shall be sold, or if all of it be sold, at a price not exceeding the whole amount of such bonds then outstanding, with the interest accrued thereon.

Fifth. Article fifth. In case default shall be made in the payment of any half year's interest on any part of the said bonds, at the time and in the manner in the coupons issued therewith provided, the said coupons having been presented and the payment of the interest therein specified having been demanded, and that such default shall have continued for the period of six months after the said coupons shall have become due and been demanded as aforesaid, and then and thereupon the principal of all the said bonds shall become immediately due and payable.

Sixth. Article sixth. The said trustees shall also, in their discretion, have full power to convey or release, upon the written request of the Western Railroad Company, any lands acquired or held for the purposes of stations, depots, shops or other buildings, and shall also have power to convey or release as aforesaid, on like request, any lands or
40 property which, in their judgment, shall not be necessary for use in connection with the said railroad, or which may have been held for a supply of fuel, gravel, or other material, and also to convey or release as aforesaid, on like requests, any lands not occupied by the track which may become disused by reason of a change of the location of any station-house, depot, shop, or other adjacent building connected with the said railroad, or any part thereof, and such lands not occupied by the tracks and adjacent to such station-houses, depots, shops, or other buildings, as the company may deem it expedient to disuse or abandon by reason of such change, and to consent to any such change, and to such other changes in the location of the track or depot or other buildings as in their judgment shall have become expedient, and to make and to deliver the instruments necessary or proper to carry the same into effect; but any lands which may be acquired for permanent use or substitution for, and so released, shall be conveyed to the trustees upon the trusts of these presents; and the trustees shall also have full power to allow the said company from time to time to dispose of, according to its discretion, such proportions of the equipments, machinery, and implements, at any time held or acquired for the use of the said railroad, as may have become unfit for such use, replacing the same by new, which shall be conveyed by the said company to the trust-
41 ees, or to be otherwise made subject to the lein and operation of these presents.

Seventh. Article seventh. It is hereby declared and agreed that it shall be the duty of the trustees to exercise the power of entry hereby granted, or the power of sale hereby granted, or both, or to proceed by suit or suits in equity or at law to enforce the rights of the bondholders, in the several cases of default herein specified, upon the requisition of bondholders, subject to the qualifications herein expressed, as follows:

First, if the default be made as to the interest or principal of any of the said bonds, upon a requisition in writing, signed by any holder or holders, and a proper indemnification by such holder or holders to the trustees, against the costs and expenses to be by them incurred, it shall be the duty of the trustees to enforce the rights of the holders under these presents, by entry, sale, or suit or suits *or suits*, in equity or at law, as said trustees, being advised by counsel learned in the law, shall deem most expedient for the interest of such holder or holders. Second, if the default be in the omission of any act or thing required by these presents for the further assuring the title of the trustees to any

property or franchises now possessed or hereafter acquired, or in the omission to comply with any provision of these presents to be observed, performed, or kept by the said company, then, and in either of such cases, it shall be the duty of the trustees, upon adequate indemnity, as
42 aforesaid, and upon the requisition in writing to enforce the rights of such holder or holders as provided.

Eighth. Article eighth. If the party of the first part shall well and truly pay, or cause to be paid, the principal of said bonds when the same shall become due, and all interest thereon when the same shall have become payable, and shall have been demanded, according to the tenor of said bonds, and of the coupons thereto annexed, and comply with all other requirements hereof, according to the true intent and meaning of these presents, then in that case the estate, right, title, and interest of the said parties of the second part and their successors in the trust hereby created shall cease, determine, and become void; otherwise the same shall be and remain in full force and virtue.

Ninth. Article ninth. It is mutually agreed by and between the parties hereto that the word trustee, as used in these presents, shall be construed to mean the trustees for the time being, whether original or new, and it is mutually agreed by and between the parties hereto that the said trustees shall be entitled to just compensation for all services which they shall hereafter render in their trust, to be paid by the said company, or out of the property, and for that purpose may at any time apply to the courts, without notice to any person, except to the said party of the first part, its successors or assigns, that the said trust-
43 ees, or any of them, or any successor, may resign or discharge himself of the trust created by these presents by notice in writing to the said company three months before such resignation shall take effect, or such shorter time as they may accept as adequate notice, upon the due execution of the conveyances hereinafter required. That in case, at any time hereafter, any of the said trustees, or any trustee hereinafter appointed, shall die, or resign, or become incapable, or unfit to act in the said trust, a successor to such trustee shall be appointed by the said company, and the said trustee so appointed shall be, jointly with the surviving trustee or trustees, vested with all the right, power, and authority as is conferred upon the original trustees by these presents, so far as such effect may be lawful; but, in the event of a resignation, the trustee so resigning shall immediately execute and deliver all such deeds and instruments as may be necessary and expedient for assuring the legal estate in the premises to the trustees. And upon the death, resignation, or removal, by any court of competent jurisdiction, of any trustee, whether original or appointed, all his power and authority by virtue hereof shall cease; provided, nevertheless, and it is hereby declared and agreed, that in case it shall at any time hereafter prove impracticable, after reasonable exertions, to appoint, in the man-
44 ner hereinbefore provided, a successor in any vacancy which may have happened in said trust, application in behalf of the holders of the bonds secured hereby may be made to any court of competent jurisdiction for the appointment of a new trustee or trustees; and the said party of the first part, for itself, its successors, or assigns, in consideration of the premises, and of one dollar to it duly paid by the said parties of the second part, the receipt whereof is hereby duly acknowledged, hereby covenants and agrees, to and with the parties of the second part and their successors and assigns, that whensoever, and as often as the party of the first part, its successors or assigns, shall hereafter acquire any lands, or any equipments, or any other property, or any things, of whatever name or nature, for use in connection with the said

railroad, or of any other part of either thereof, or shall acquire any other property, rights, franchises, or things whatsoever, the said party of the first part, its successors or assigns, shall and will acquire, possess, and hold the same, and every part and parcel thereof, upon and subject to the trusts of this indenture until conveyance thereof in pursuance of the covenant next hereinafter contained shall be duly made and delivered to the said parties of the second part, or their successors, in trusts by these presents created.

And the said party of the first part, for itself, its successors and
45 assigns, in consideration of the premises and of one dollar to it duly paid by the parties of the second part, the receipt whereof is duly acknowledged, hereby covenant and agrees, to and with the said parties of the second part, their heirs, successors, and assigns, that the said party of the first part, its successors and assigns, shall and will, from time to time, and at all times hereafter, and as often as requested by the parties of the second part, execute and deliver and acknowledge all such further deeds, conveyances, and assurances in the law for the better assuring unto the parties of the second part and their successors in said trust upon the trust herein expressed, the railroad equipments, appurtinances, franchises, property, and things hereinbefore mentioned, and to which the said company is and may hereafter for any reason become entitled, or which the said company, its successors and assigns, may in any manner acquire, and also all the property, rights, franchises, and things whatsoever which may be hereafter acquired by the said party of the first part, its succesors or assigns, and by the said trustees, or their counsel, learned in the law, shall be reasonably advised, devised, or acquired; and it is also mutually understood and agreed by and between the parties hereto that the said parties of the second part, their
46 successors in said trust, shall be accountable, liable, or responsible for reasonable care and diligence only in performance of the trusts hereby created, and in the management of said estate and property, in like manner as bailees without reward, and shall not be accountable, liable, or responsible for the action of any agent, depository, or substitute employed by them, when such agent, depository, or substitute shall have been selected with reasonable discretion.

In witness whereof the said party of the first part has caused its corporate seal to be hereto affixed, and the same to be attested by the signature of its president, countersigned by its secretary and treasurer, and signed by three of its directors, and the parties of the second part have hereto set their hands and seals to evidence their acceptance of the trust hereby created, the day and year first above written.

[SEAL.]

A. J. JONES, *President.* [SEAL.]
D. J. UNDERWOOD, *Director.* [SEAL.]
W. B. RICHARDSON, *Director.* [SEAL.]
J. W. HOPKINS, *Director.* [SEAL.]
T. S. LUTTERLOH, *Trustee.* [SELL.]
RUFUS Y. McADEN, *Trustee.* [SEAL.]
HENRY J. ROGERS, *Trustee.* [SEAL.]

Countersigned:
J. H. DAVIS,
Secty. & Treasr.

Witness—
B. FULLER.

Witness', as to Henry J. Rogers—
WM. H. CLARKSON,
CHARLES NETTLETON.

REC. 2^5—2

47 STATE OF NORTH CAROLINA,
Wake County:

Probate court.

Be it remembered that on the 18th October, 1870, personally appeared before me, John N. Bunting, probate judge in and for the county of Wake, Rufus Y. McAden, who acknowledged that he signed the above deed of trust for the purposes therein expressed.

In witness whereof I have hereunto subscribed my name and affixed the seal, at Raleigh, the date and year above written.

[SEAL.] J. N. BUNTING,
Judge of Probate and Superior Court Clerk.

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on the twenty-seventh day of October, A. D. one thousand eight hundred and seventy, before me, Charles Nettleton, a commissioner of the State of North Carolina in and for the State of New York, duly appointed and commissioned by the governor of
48 the State of North Carolina to take the acknowledgements of deeds, &c., to be used or recorded therein, personally came Henry J. Rogers, trustee in the within instrument, and acknowledged the execution thereof for the purpose therein expressed as trustee therein described.

In witness whereof I have hereunto set my hand and affixed my official seal.

[SEAL.] CHARLES NETTLETON,
Commissioner for North Carolina in New York,
117 *Broadway, New York City.*

STATE OF NORTH CAROLINA,
Cumberland County:

Probate court, October 31st, 1870.

Then was the execution of the foregoing deed of trust by A. J. Jones, president of the Western Railroad Company, D. J. Underwood, W. B. Richardson, John W. Hopkins, T. S. Lutterloh, and J. H. Davis duly proven before me by the oath and examination of B. Fuller, the subscribing witness thereto, and the certificate of J. N. Bunting, judge of probate for the county of Wake, as to the acknowledgement before
49 him of its execution by Rufus Y. McAden; and of Charles Nettleton, commissioner of affidavits for North Carolina, for the city, county, and State of New York, appointed by the governor of North Carolina, as to the acknowledgement before him of its execution by Henry J. Rogers, being exhibited to me, upon such proofs and acknowledgements I do adjudge the said deed to be duly proved and acknowledged for the purposes therein set forth.

Therefore let the said deed and *and* the certificates thereon be duly recorded in Cumberland County.

A. McPHERSON, JR.,
Judge and *Probate.*

Received into office October 31st, 1870, at 10 o'clock and 45 minute

this a. m., and registered October 31st, 1870, (with nine hundred dollars rev. st. attached.)

STATE OF NORTH CAROLINA,
Cumberland County:

REGISTER'S OFFICE, *February* 19, 1872.

I certify the foregoing to be a true copy from the records of my office, book I, No. 3, page 120.

WM. F. CAMPBELL, *Register,*
By A. M. CAMPBELL, *Deputy.*

50 And thereupon, at the request and by the direction of the complainant, by his solicitors aforesaid, writs of subpœna are issued in pursuance of the prayer of the said bill of complaint against the said defendants, returnable on the first Monday in June, A. D. 1873; which said writs of subpœna are in the following words and figures, to wit:

51 UNITED STATES OF AMERICA,
Eastern District of North Carolina, ss:

The United States of America to The Western Railroad Company, Rufus Y. McAden, Thomas S. Lutterloh, John D. Williams, Henry J. Rogers, Edmund J. Lilly, Henry Lilly, Alfred A. McKeithan, Augustus W. Steel, and Isaac B. Grainger:

We command you, and every one of you, that you appear before the judges of our circuit court of the United States of America for the eastern district of North Carolina, at the office of the clerk of the said court, in the city of Raleigh, in said district, on the first Monday in the month of June next, to answer the bill of complaint of Henry W. Howell, filed in the clerk's office of said court, in said city of Raleigh, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the eastern district of North Carolina to execute.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, at Raleigh, in said district, the last Monday in November, 1872, and in the ninety-seventh year of the Independence of the United States.

Issued 6th day of May, 1873.

[SEAL.] N. J. RIDDICK, *Clerk.*

52 *Memorandum.*

The within-named defendants are notified that, unless they enter their appearance in the clerk's office of said circuit court, at Raleigh aforesaid, on or before the day to which the within writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

N. J. RIDDICK, *Clerk.*

And on the return-day of said writs, to wit, on the first Monday in June, 1873, the same being rule-day, at the office of this court, the said writs are returned by the marshal "Executed" on all the defendants.

Notice of the motion for the appointment of a receiver is returned executed upon Thomas S. Lutterloh and L. C. Jones, May 19th, 1874.

53 *Appearance of defendants.*

Smith and Strong, and James C. MacRae, enter their appearance for the defendants.

And afterwards, to wit, on the 13th day of June, 1873, the answers following are filed:

Answer of the defendant The Western Railroad Company.

Circuit court of the United States for the eastern district of North Carolina, fourth circuit. In equity. To spring term, 1873.

HENRY W. HOWELL, ON BEHALF OF HIMSELF and others,
against
RUFUS Y. MCADEN, HENRY J. ROGERS, THOMAS S. Lutterloh, The Western Railroad Company, John D. William, Henry Lilly, Edmund J. Lilly, Alfred A. McKethan, Augustus W. Steel, and Isaac B. Grainger.

The answer of the Western Railroad Company, one of the defendants, to the bill of complaint of Henry W. Howell, complainant.

The defendant, reserving to itself all rights of exception to the said bill of complaint, for answer therein saith:

To the first interrogatory. It is true that the defendant is a corporation created by act of the general assembly of the State of North Carolina, as set forth in the bill of complaint.

54 To the second interrogatory. By the charter of said company, and acts amendatory thereof, said company is authorized to construct a railroad from Fayetteville to some point on the North Carolina Railroad, at or between Salisbury and Greensboro', and thence to the Virginia line, and from any point on its road to the Wilmington, Charlotte and Rutherford Railroad, and thence to the South Carolina line. The present termini of the said road are Fayetteville, on the eastern end thereof, and Egypt, on the western end thereof; and the stockholders of said company, before the making of the deed of mortgage set forth in the bill of complaint, located the line of the said road to be built to Greensboro', on the North Carolina Railroad.

To the third interrogatory: About forty-three miles of the said railroad have been built and operated by said company for about twelve years.

To the fourth interrogatory: An act of the general assembly of said State, entitled "An act to enable the Western Railroad to complete its road from the coal-fields in Chatham County to some point on the North Carolina Railroad," ratified the 20th day of December, A. D. 1866, was duly accepted by the said company.

To the fifth interrogatory: By the 3d section of said act, power and authority was given to said company as set forth in said third section, which reads as follows:

"SECTION 3. Be it further enacted, That to enable such company to raise the money necessary to construct and extend said road to some point on the North Carolina Railroad, to connect with said road at such point as shall be selected by the Western Railroad Company, or by the

president and directors of the same, that said president and directors are hereby authorized and empowered to issue the mortgage-bonds
55 of said company in sums of not less than one hundred dollars each, and not exceeding in amount nine hundred thousand dollars, and to be negotiated at not less than par, and not to mature at an earlier period than thirty years, in sums of not less than one hundred dollars each, payable at such time and place, and at such rate of interest, not to exceed eight per cent., as may be authorized by said company, and, to secure the payment thereof, may make a mortgage upon the railroad and any and all of its property and income, in such manner and form as they may determine."

To the sixth interrogatory: The stockholders of said company, in general meeting on the 7th day of April, 1870, by resolution, a copy of which is hereto annexed, marked "A," did authorize and empower the president and directors of said company to issue the mortgage-bonds of said company, and to make a mortgage upon said railroad and all its property, as set forth in the above-named resolutions hereto annexed as part of this answer. But this defendant believes, and so charges, that said authority was obtained from said company by reason of the fraudulent misrepresentations of Andrew J. Jones, then president of said company, and others, and conspiring with him to cheat and defraud the said company out of all its property and franchises, and by reason of the undue influence exercised by the said A. J. Jones, president as aforesaid, over the proxy of the State of North Carolina, and the proxies of the county of Cumberland, and of the town of Fayetteville, who were all men easily influenced by the said A. J. Jones, and who had control of the votes of a large majority of the stock in said company; that many of the private stockholders in said meeting protested against the said action, upon the ground that the said Andrew J. Jones, president, had recently received a large amount of special-tax bonds, to wit, one million three hundred thousand dollars, the proceeds for the sale of which bonds he had not appropriated to the completion of said
56 company's road, but had squandered the same, and made no account thereof. And upon the further ground that the then president did not intend to build the said company's road, but only to further involve the said company. And upon the further ground that the said contractors were insolvent and unable to carry out the terms of their contract; and when they found that, by reason of the preponderance of the vote of the State, county, and town, they were powerless to prevent the perpetration of this injury, refused to vote at all, and withdrew from the said meeting.

That in pursuance of the said conspiracy, the said A. J. Jones, then president, as aforesaid, on the 11th day of October, 1870, made and executed a contract with one John A. Hunt, who pretended to act for himself, and one N. E. Scales, as the firm of J. Hunt & Co.; but the said Scales, according to the information and belief of this defendant, took no part in the making or transferring of said contract, and knew very little, if anything, about it, he being at that time a resident of the State of Alabama; that said contract was a fraud upon the rights of the stockholders of said company, and was intended by its makers to result in the sacrifice of all the property and franchises of the said company; that its rates were ruinous, and the prices agreed to be given were greater than those offered to be taken by several more responsible bidders; that said contractors were known to be insolvent, and were not required to give bond for the faithful performance of their contract; that shortly after said contract was made, the said John A. Hunt conveyed

and assigned, or attempted to convey and assign, the interest of the said J. Hunt & Co. in said contract to Thomas S. Lutterloh; that by the terms of said contract the said mortgage-bonds were directed to be placed in the hands of an agent, to be selected by the president of said company and the said contractors, and were to be drawn out of the hands of said agent by the joint order of the said president and contractors, as the work upon the said road progressed; that Thomas S. Lutterloh was one of a committee of directors who arranged the
57 terms of said contract and concluded the same; that after the transfer or attempted transfer of said contract to said Lutterloh, the said A. J. Jones and said Lutterloh procured a modification of said contract, by which all of said bonds, except ten thousand dollars of the same, were to be placed immediately in the hands of said Lutterloh, to be used by him as to him might seem proper.

That said Lutterloh did take into his possession four hundred and sixty thousand dollars of said bonds, which bonds, together with the said contract, the said Lutterloh subsequently delivered up to the said company. That at the same time the said Lutterloh took possession of the aforenamed bonds, he, the said Lutterloh, placed four hundred and twenty-five thousand dollars of said bonds in the hands of the firm of L. P. Bayne & Co., which firm was composed of L. P. Bayne and Henry J. Rogers, as collateral security for the payment of about twenty thousand five hundred dollars, which it was claimed was due by the said Western Railroad Company to Rufus Y. McAden, for advances made by the said McAden to John A. Hunt, and the payment thereof assumed by A. J. Jones, as president as aforesaid. That the said Lutterloh and McAden and Rogers, trustees in the mortgage aforesaid, each took into his possession five thousand dollars of said bonds as pay for his services, which services this defendant says they have never performed. So by the said fraud and conspiracy all of the said mortgage-bonds passed out of the possession of said company without the said company having received any consideration for the same. A copy of said contract is hereto annexed, together with a copy of the transfer or attempted transfer of the same, marked "B."

To the seventh interrogatory: That a mortgage, a copy of which is attached to complainant's bill, was made in the month of October, 1870, by Andrew J. Jones, president, and D. J. Underwood, W. B. Richardson, and J. W. Hopkins, directors, and the said mortgage-deed was countersigned by J. H. Davies, secretary of said company, and the
58 seal of said company was affixed by said Davies; and at the same time Thomas S. Lutterloh, one of the trustees named in said mortgage, signed and sealed the same; and this defendant is informed and believes, and so charges, that at the time of the above-recited execution of said mortgage, the names of Thomas S. Lutterloh, Rufus Y. McAden, and William R. Utley were set forth in said deed as trustees; and that after the execution, as aforesaid, the name of William R. Utley was stricken out of said deed and the name of Henry J. Rogers was inserted in its stead; and that said deed was never re-executed by said J. H. Davies, secretary, (who had affixed the corporation seal thereto,) after said alteration had been made.

To the eighth interrogatory: This defendant is informed and believes, and so charges, that the said mortgage and bonds were not made and issued in accordance with the requirements of the act of the general assembly aforesaid, under which act they purported to have been made and executed; for that by the third section of said act, as above set forth, it is expressly directed that the said bonds are not to be negotiated at less

than par, and are not to mature at an earlier period than thirty years; whereas by the terms of said mortgage, in article 5 thereof, and by the terms of the said bonds, it is provided, that, in case default shall be made in the payment of any half-year's interest on any part of said bonds, after the presentment and demand, and such default having continued for six months, then the principal of all of said bonds shall immediately become due and payable. And this defendant, further answering, says that, by the said third section of the act of the general assembly aforesaid, the said company was empowered to make a mortgage on said company's railroad, and any and all of its property or income, in such manner and form as they may determine; whereas, by the said mortgage-deed, all of the franchises of said company, together with all future acquired property, are attempted to be conveyed. And this defendant, further answering, says that it is informed and
59 believes, and so charges, that the third section of the act of the general assembly aforesaid was printed upon the back of each of the said bonds, and that thus notice was given to all parties that the said company had exceeded its powers, as before set forth in the answer to this interrogatory. And this defendant is further informed and believes, and so charges, that none of said bonds were issued by the said company to bona-fide holders for value, and that none of said bonds have passed into the hands of bona-fide holders for value; but this defendant charges that each of the trustees took without consideration or authority five thousand dollars of said bonds, and that the said McAden has stated that he still holds the bonds so appropriated by him, and will hold the same until his rights are determined by law in relation thereto; that the said Lutterloh has transferred and assigned all of the said bonds which were in his possession, and all of his interest in the bonds in the hands of L. P. Bayne & Co., as aforesaid, to the said company, and has stated that the five thousand dollars of bonds appropriated by him as trustee had been sent to Europe as a sample, and would be returned by him to the company; that the plaintiff Howell, who claims to be the owner of five thousand dollars of said bonds, is in the employ or is in some way closely connected with L. P. Bayne & Co., and had notice that the said company denied the right of the said trustees, or of any other persons, to transfer the said bonds, and that said company denied the validity of said bonds before he became the holder of any of the same; that this defendant caused to be published in the New York Journal of Commerce, the Wall Street Journal, and the World, all newspapers published in the city of New York, for weeks, in the months of February and March, 1871, a notice to all persons that this defendant denied the validity of said bonds and mortgage, and demanded the return to this defendant of all of said bonds from the holders thereof; that the said L. P. Bayne & Co. hold all of the balance of said bonds which were not appropriated by the said trustees, and which have not been returned to the defendant, and that the said Bayne & Co.
60 only claim that the said bonds in their possession are held by them as collateral security for the payment of the sum of about seventy-five thousand dollars, which they claim for advances and commissions, and which claim this defendant denies; and this defendant has brought suit in the supreme court of New York against the said L. P. Bayne & Co. for the said bonds, and for damages for the detention of the same. And this defendant also brought an action in the superior court of Cumberland County against the said trustees, to compel a rescission and cancellation of said mortgage, and to compel each of the said trustees to deliver up to this defendant the aforesaid bonds which

each of said trustees had taken into his possession under a claim for commissions, and expenses and services, and for other relief; which said action, as far as it related to the said Henry J. Rogers, has been removed by affidavit into this court, where it is now pending; and as far as it related to the said McAden and Lutterloh, has been removed by affidavit into the superior court of Chatham County, where it is now pending. Copies of the complaint and answers in said action are herewith filed as a part of this answer.

To the ninth interrogatory: This defendant, denying the right of any of the present holders of said bonds to hold the same, and affirming that it never has received value for any of the same, and that the same are void for fraud, and that none of the said bonds are in the hands of an innocent purchaser for value, has never, nor has any other person for it ever, since the issuing or attempted issuing of said bonds, placed any money at the National Bank of the Republic, in the city of New York, to pay the interest, or any part thereon, on said bonds.

To the tenth interrogatory: This defendant is informed and believes, and so charges, that the complainant, Howell, is not the bona-fide owner and holder of any of the said bonds or coupons.

61 To the eleventh and twelfth interrogatories: This defendant has received notice of protest of a coupon of bond No. 38 for said Howell, at the Bank of the Republic, in the city of New York; that this defendant had placed no funds in said bank to pay said coupon; and further this defendant has not sufficient knowledge in the premises to answer.

To the sixteenth interrogatory: Since the execution of said mortgage this defendant has remained in possession of said railroad, and all the other property conveyed or attempted to be conveyed by said mortgage, and has operated said railroad, used said property, and made some money thereby, as will more fully appear by reference to the account of receipts and expenditures herewith filed in paper marked "C" as part of the answer to this interrogatory. And no part of said receipts have been applied to the payment of interest on said bonds.

To the seventeenth interrogatory: In the year 1871, the defendants John D. Williams, Edmund J. Lilly, Alfred A. McKethan, and Augustus W. Steel were directors elected by the individual stockholders in said company; their term of service commenced on the 18th day of January, 1871, and the same persons were re-elected at the general meeting of stockholders of said company in April, 1871, and held the said office of directors for one year from said general meeting, when they were again elected in April, 1872, and held the said office until April, 1873, when all, except A. W. Steel, were again elected, and hold the said office at the present time. Murdoch McKinnon was another director in the year 1871, elected by the individual stockholders, and R. P. Buxton, John Reilly, W. A. Guthrie, and L. J. Haughton were, on the 18th of January, 1871, appointed directors on the part of the State of North Carolina, and were re-appointed at the general meeting of stockholders

62 of said company in April, 1871, for one year from said general meeting, except the said R. P. Buxton, who resigned his position as director in March, 1871; and at the general meeting of the stockholders in April, 1871, James R. Lee was appointed a State director in the stead of the said R. P. Buxton.

To the eighteenth interrogatory: This defendant was sued in the United States circuit court for the district of North Carolina, by Matthew Baird, surviving partner of the firm of M. W. Baldwin & Co., for a large amount, and full pleas were entered in said suit on behalf of the

defendant, but this defendant believes that there was in reality no good defence to the said action, and that said pleas were entered not with the expectation of success, but for delay.

This defendant was advised by its counsel that there was no defence which would avail to prevent a judgment being rendered against it. Said counsel was instructed to take advantage of any and every valid ground of defence for this defendant; the case was regularly reached on the docket for trial, and this defendant had no ground for a continuance. This defendant was advised by counsel that the defence which this defendant had set up was entirely untenable, and that a further resistance would not prevent judgment being taken at that term, and would prevent said counsel from obtaining any extension of time, or any other favor from the plaintiff in said action. The debt upon which said suit was instituted was for the purchase-money agreed to be paid by this company for a locomotive engine, which engine was sold and delivered by said Baldwin & Co. to the said company, and was received and used, and is still used by the said company, and the said debt was honestly and justly due and owing by this defendant; that defendant's counsel examined the witnesses who were proposed to be introdueed on the part of this defendant, and informed this defendant that their testimony would not substantiate the pleas which had been entered for this defendant.

63 To the nineteenth interrogatory: This defendant is informed and believes that, while A. J. Jones was president of said company, favorable terms of compromise were offered by the plaintiff in said action to the said company, and that said propositions were then refused, when they ought to have been accepted. But no terms of compromise were ever offered to this company since the removal of the said A. J. Jones, president, and the then directors, and that said company was left in such a condition by its former officers that at no time prior to the rendition of said judgment would the said company have been able to raise a sum sufficient to pay off said indebtedness or said terms of compromise, if they had been offered; and that on account of the mortgage which is by this bill attempted to be foreclosed the company had not the credit to borrow the money.

To the twentieth interrogatory: Judgment was entered against this defendant, and in favor of M. Baird, surviving partner, at the term of the United States circuit court, and for the amount as specified in the bill of complaint and in this interrogatory.

To the twenty-first interrogatory: The defendants, John D. Willams, E. J. Lilly, Henry Lilly, A. A. McKeithan, and A. W. Steel did, on or about the day of March, 1872, purchase said judgment from the plaintiff Baird; and this defendant believes that they paid the full amount of said judgment, with interest and costs, and that said judgment was trasferred to them by the attorney for said M. Baird, plaintiff.

To the twenty-second and twenty-third interrogatories: This defendant did agree to pay to the said purchasers of said judgment interest at the rate of eight per cent. per annum, and a commission of two and one-half per cent. upon the renewal of their obligation every

64 ninety days, in consideration that the said purchasers should hold the said judgment and not suffer the property of said company, or the equity of redemption, to be sold under execution. The sum of fourteen hundred and fourteen $\frac{19}{100}$ dollars has been paid in pursuance of said agreement, at intervals of ninety days, since the purchase of said judgment; and on or about the fifth day of May, 1873, the sum of sev-

enteen thousand five hundred dollars was paid by certificate of deposit of the Bank of New Hanover of that amount, to Henry Lilly, one of the purchasers of said judgment, in liquidation of so much of the principal of said judgment. The said sum was so paid by Isaac B. Grainger, upon the order of the president of said company, the said sum being the amount paid into the hands of the said Grainger, subject to the order of said company, as is hereinafter more fully set forth.

To the twenty-fourth interrogatory: The execution upon said judgment was in the hands of the United States deputy marshal, and he was about to advertise and sell the property of the company, including its railroad. It was understood and believed by the directors of said company that L. P. Bayne & Co., who pretended to have a large claim against said company, and other parties who were inimical to this community, were anxious that the sale under execution should take place. It was understood further that the attorney who represented the said A. J. Jones and L. P. Bayne & Co. and the three trustees in said mortgage, all of whom claimed large amounts against said company, was anxious for said sale; and it was further understood and believed that the said attorney had intimated to the said deputy marshal that if said sale were made, the trustees in said mortgage would join with the marshal in conveying a good title to the whole property of said company to the purchaser at said execution sale. And it was further believed that, the said mortgage being fraudulent and void if the whole property and franchises of the company were sold under this execution,
65 notwithstanding the mortgage, the purchaser would get a good title of the whole.

Under these circumstances, and after consultation with the board of directors of said company, it was agreed that Messrs. John D. Williams, A. A. McKethan, E. J. Lilly, A. W. Steel, and such others as they might induce to advance part of the money, should purchase the said judgment, and afford the said company an opportunity to pay off the same out of the earnings of said company, and thus protect the interests of said company and the community. This defendant believes that the said purchasers paid the whole judgment and took an assignment of the same to themselves.

To the twenty-fifth interrogatory: Two passenger-coaches were bought by this defendant during the year 1872 for about the sum of two thousand nine hundred dollars, including expenses of transportation; they were bought with the funds of the company, and are in possession of said company and are its property. After the repairs placed upon said coaches in the shops of said company, the two are worth at least five thousand dollars. Other rolling-stock has been constructed in the shops of said company, and is now in the use and possession and is the property of said company; and nearly all of the rolling-stock of said company which was turned over to the present president of said company by his predecessor in office, the said A. J. Jones, in a bad condition, has been repaired and new wheels and axles placed thereon; and the whole rolling-stock of said company now in its possession and use, and its property, has been largely increased in value since it has been under the control of the present president, and since the making or attempted making of said mortgage, and is worth at least eighteen thousand dollars more than it was worth at the time of the making or attempted making of said mortgage. The railroad has been kept in good repair; and with its improvements is in better condition than it was at the last-named time.

66 New buildings necessary have been erected, and others are now

in process of construction, and the property of the road is now much more valuable than it was at said time.

In the year 1872, about the month of October, it became necessary that the company should have another locomotive-engine, and the said company having no funds to purchase the same for cash, and its credit having been impaired by reason of the said mortgage, John D. Williams, E. J. Lilly, Henry Lilly, A. A. McKethan, and A. W. Steel purchased a locomotive-engine for the sum of about six thousand three hundred dollars, as this defendant is informed and believes, with their own funds and not with the funds of the said company, and rented the same to the said company for the sum of one hundred dollars per month, which sum is an exceedingly moderate rate of renting, the said engine having been purchased at a very low price, and being worth much more than was paid for the same; and the said company has had the use of said engine since said time, but the property of the said engine remains in the said John D. Williams, E. J. Lilly, Henry Lilly, A. W. Steel, and A. A. McKethan, and the said company has no ownership in the same.

To the twenty-sixth interrogatory: At the time of the making or attempted making of said mortgage, this defendant did own five hundred thousand dollars of second-mortgage bonds of the Wilmington, Charlotte and Rutherford Railroad Company, and a large amount of coupons attached thereto, and some coupons detached from another series of five hundred thousand dollars of second-mortgage bonds of the said Wilmington, Charlotte and Rutherford Railroad Company, the bonds from which the same were detached having been previously returned to the state treasurer, under act of the general assembly. Whether said bonds and coupons are sufficiently described by the terms of said mortgage or not this defendant is advised is a question of law upon the construction of the said mortgage, and that it is not necessary for this defendant to answer further upon this point.

67 To the twenty-seventh interrogatory: That about seventeen thousand five hundred dollars of the said coupons were used by this defendant as a set-off or counter-claim in an action brought in the superior court of New Hanover County, for the value of certain railroad-iron obtained by this company from the said Wilmington, Charlotte and Rutherford Railroad Company about the year 1863. The said second-mortgage bonds and coupons were placed in the hands of the attorney of this defendant, to be by him used in a compromise, and for the best interest of this defendant, in an action brought by the holders of the first-mortgage bonds of said Wilmington, Charlotte and Rutherford Railroad Company against the last-named company and all other parties in interest, one of which was this defendant, for a foreclosure of the said first mortgage upon the said Wilmington, Charlotte and Rutherford Railroad. And this defendant is informed and believes that the said attorney has transferred the said second-mortgage bonds and coupons to the said first-mortgage bondholders. And this defendant is advised and believes that the said second-mortgage bonds and coupons would have been utterly valueless if they had remained in the possession of this defendant until the decree of foreclosure upon the first-mortgage bonds of the said company. The sum of seventeen thousand five hundred dollars was paid by the said first-mortgage bondholders into the hands of the defendant Isaac B. Grainger, and upon the order of the president of this defendant, as it is informed and believes, was deposited by the said Grainger to the credit of the said Henry Lilly, and was by him appropriated, pro tanto, in satisfaction of the judgment of M. Baird, above referred to, against this defendant. That the said sec-

ond-mortgage bonds never were transferred to the defendant Isaac B. Grainger, and that said Grainger has had nothing to do with said bonds in any manner or form, and has had nothing to do with any of the matters herein referred to, except to receive the said sum of money and to pay over the same upon the order of the president of this defendant.

68 And this defendant, further answering, says that it has been much impeded in its efforts to complete its said road, and has been much damaged by the delay in the completion of its said road, by reason of the existence of the said alleged mortgage; that it has always, since the re-organization of its company, in January, 1871, denied the validity of the said mortgage, and declared the same void on account of the frauds and irregularities connected therewith; that it has made earnest efforts to bring the question of the validity of said bonds and mortgage to a judicial termination, and is now and ever has been willing and ready to pay all such sums as it may be required to pay upon such bonds by a court of competent jurisdiction; and that it has failed and refused to provide funds to meet the interest said to be falling due upon said bonds, not from any desire or intention to avoid the payment of any of its just indebtedness, but simply from the reason above stated, that it did not recognize the justice of the claim set up against it; that under the present management the property of said company has been judiciously managed and largely improved in value, a large amount of old indebtedness contracted under former administrations has been paid off and discharged; that the said company is in a much more prosperous condition than it was at the time of the execution of said alleged mortgage, notwithstanding the many and great difficulties under which it has labored, and that the property of said company is largely more than sufficient to pay off and discharge the largest amount which can possibly be claimed by reason of liabilities arising under said alleged mortgage.

And this defendant submits that having shown a faithful, proper, and economical administration of the affairs of said company, and having shown further that of the nine hundred thousand dollars of the alleged mortgage-bonds, four hundred and sixty thousand dollars have been returned to this defendant, four hundred and twenty-five thousand are held by L. P. Bayne & Co., as collateral security for about the

69 sum of seventy-five thousand dollars, claimed by said L. P. Bayne & Co. to be due upon said bonds so held by them, and that an action is now in progress in the State of New York to determine the rights of parties, this defendant insisting upon the return of all of said bonds so held as aforesaid, and damages for the detention of the same; and this defendant having further shown that all the balance of said bonds, to-wit, fifteen thousand dollars, were that portion which was taken possession of by each of the said trustees upon the execution by them of the alleged mortgage, and that an action is now pending in the superior court of Chatham County, in this State, against the said Lutterloh and McAden, and in this court against the said Rogers, to compel a return of the said bonds to this defendant; and that the said Lutterloh and McAden have admitted that they each have possession or control of the amount of said bonds so taken by each of them as trustees, it will appear to this court that but a small amount of money is actually involved in this suit, as compared with the value of this defendant's property. This defendant submits that the appointment of a receiver by this honorable court, as prayed for in the bill of complaint, could not more fully secure the complainant or other claimants, but would only have the

effect to exhaust a portion of the income of said company in the payment of commissions to said receiver, and thus divert so much money from the proper end to which it should be applied.

And the said defendant, further answering, denies that the said complainant is entitled to the relief, or any part thereof, in the said complaint demanded. And the said defendant prays the same advantage of its aforesaid answer as if it had pleaded or demurred to the said bill of complaint. And the said defendant prays to be dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

And this defendant, the Western Railroad Company, doth hereby aver and verify the truth of the facts and averments contained in
70 the above answer, under its common seal, which it has for that purpose caused to be hereto annexed.

WESTERN R. R. CO.,
By L. C. JONES, *President.*

SMITH & STRONG,
J. C. MACRAE,
Sol's for Defendants.

UNITED STATES OF AMERICA,
Eastern District of North Carolina :

L. C. Jones, being duly sworn, deposeth and sayeth that he is president of the Western Railroad Company, this defendant, named in the foregoing answer, subscribed by him under the seal of said company; that he has read the same, and knows the contents thereof; and that the matters and things therein stated to be of his own knowledge are true, and as to those stated on information and belief he believes them to be true.

L. C. JONES.

Sworn to and subscribed before me this 12th day of June, 1873.
A. MCPHERSON, JR.,
Clerk of S. C. Cumberland Co.

EXHIBIT A.

The same as Exhibit A filed with complaint.

EXHIBIT B FILED WITH ANSWER.

Articles of agreement made and concluded this 11th day of October, 1870, between John A. Hunt and Nathaniel E. Scales, copartners, of the firm and style of J. Hunt & Co., of the first part, and the Western Railroad Company, of the second part; the Western Railroad Company making this contract under the by-laws of said company, and under a resolution of the directors of said company, as follows:

"Resolved, That the president of the Western Railroad Com-
71 pany and a committee of three of the directors, with the assistance of the chief engineer of said road, be authorized to contract with Messrs. Hunt and Scales, or other parties, to build said Western Railroad from Egypt to Greensboro'." The following-named directors were appointed on said committee: D. J. Underwood, W. B. Richardson, and T. S. Lutterloh.

Whereby it is covenanted and agreed as follows, viz:

The said J. Hunt & Co., of the first part, contractors, do hereby covenant and agree to prepare and finish, in a thorough and workmanlike

manner, in accordance with the annexed specifications and conditions, all that portion of the Western Railroad, except the bridge over Deep River, for which there is a separate contract, commencing on the western bank of Deep River and running westward on the line of survey of said road to Greensboro', in the county of Guilford, and building so much of said road continuously as the means of the railroad as hereinafter provided may pay for.

I. Article 1. The said J. Hunt & Co. of the first part shall commence the work on or before the 1st day of November, 1870, and shall complete the same in a manner acceptable to the engineer at as early a day as practicable, not to exceed two years from the 1st day of January, 1871.

II. Article 2. The engineer shall have power to prescribe the manner of preparing for beginning and conducting any species of work to be done under this agreement, with reference to its purposes and the durability of such work, and his instructions shall be promptly obeyed. And if at any time he shall disapprove of the quality of any work, the contractor, at his own expense, shall execute the same over again, or so much thereof as is so disapproved of; and in case he shall refuse or neglect to take down and rebuild the same, the engineer shall cause the same to be done at said contractor's expense.

III. Article 3. The quantities and dispositions of excavation
72 and embankment, or any other species of work under this contract, may be changed during the progress of the work, at the pleasure of the engineer, by alterations in the grades, curves, or plan of any part of the work; and the calculation of quantities will be made anew for final settlement with the contractor, it being understood that if by such changes the work is made more expensive or less costly, the engineer may make such allowance or deduction in the price as he may deem just and equitable.

IV. Article 4. It is also agreed between the parties hereto that should the work or any portion of it executed under this contract not be of such quality as is herein stipulated for, that is, if the work or any portion of it, in the opinion of the engineer, be constructed in an inferior manner, then and in that case the monthly or final payment above provided for may and shall be withheld until such time as the engineer shall decide that the spirit of the contract has been complied with, or instead thereof the engineer shall make such deduction from the price herein stipulated to be paid as he may deem fair and right.

V. Article 5. The material found and provided by the contractor upon which any advances shall have been made shall thenceforward become the property of the Western Railroad Company. Moreover, no payment shall be made on account of work done pursuant to proposals that have been offered and accepted till contracts based on such proposals shall have been duly signed and executed.

VI. Article 6. The engineer shall decide on the quantity and quality of the work done, and his decision shall be final and conclusive.

VII. Article 7. The contractor shall not let or transfer this contract, or any portion of the same, to any other person or persons without the consent of the engineer, and on application to the engineer he shall discharge any workman or laborer from his employment.

73 VIII. Article 8. It is further agreed between the parties hereto that in case the said contractors shall refuse or neglect to perform all the covenants herein enumerated, or shall violate the spirit thereof, upon the engineer certifying such neglect, refusal, or violation to the president or board of directors, the said board may, at their option, declare the contract null and void; and in that case whatever balance

there may be unpaid for work done shall be forfeited to the use of said railroad company, or such part thereof as the engineer shall decide to be just; and the said board of directors may proceed to relet or dispose of the work remaining to be done as if this agreement had never been made.

IX. Article 9. It is further agreed that when the term engineer occurs in this contract it shall be taken as intending the chief engineer of this company for the time being, acting directly or through his assistant in charge of the work.

X. Article 10. On condition of the fulfilment by said contractors of the foregoing provisions of this contract, the said Western Railroad Company doth hereby promise and agree that the said corporation shall and will, for doing and performing the work as aforesaid, pay or cause to be paid to J. Hunt & Co., the said contractors, or their heirs, executors, or administrators, for so much of said work as is paid for in cash, according to the rates specified in the bid of said contractors, made on the 10th day of July, 1870, filed in the office of the said railroad company, and accepted by the committee of the board of directors, a copy of which bid is hereto appended, marked "A," and made a part of this contract. The remainiug portion of work to be paid for in the first-mortgage bonds of said railroad company, at their par value, according to the rates specified in the bid of the said contractors, filed in the office of the said railroad company, and dated July 12, 1870, a copy of which is hereto appended, marked " B," and made a part of this contract.

74 XI. Article 11. Monthly estimates during the progress of the work will be made of work done to the acceptance of the engineer, to an amount equal to a fair average value of the same, agreeably to this contract; and of the amount so estimated the contractors will be paid ninety per cent., and when the whole work hereby contracted for shall have been accepted by the engineer as completed agreeably to the contract, the balance due shall forthwith be paid to J. Hunt & Co., their heirs, executors, or administrators.

XII. Article 12. The said railroad company agrees to place the said mortgage-bonds in the hands of an agent, to be held subject to the joint order of the president of the said railroad company and the said contractors.

In testimony whereof the parties to these presents have hereunto set their hands and seals this 11th day of October, in the year one thousand eight hundred and seventy.

A. J. JONES, *President.*
D. J. UNDERWOOD,
T. S. LUTTERLOH,
Committee.
W. B. RICHARDSON,
J. A. HUNT & CO.,
Contractors.

Witness:
L. C. JONES.

I consent to the transfer of the above contract, January 4th, 1870, by J. A. Hunt & Co., to Thomas H. Lutterloh, by order of the president and directors of the Western Railroad Company.

L. C. JONES,
Chief Engineer.

J. A. Hunt & Co.'s bid, (cash :)

Excavation, common earth	$0	20
Embankment	0	19
Indurated clay, (very hard)	0	31
Rock-excavation	2	00
Masonry for box-culverts	5	00
75 Paving	$3	00
Masonry in arches	20	00
Ab't walls for arches	10	00
Hard-pan	0	55
For iron spikes and chains, we to furnish the same and the company to allow us 5 per cent. on cost.		
Track-laying, per mile	450	00

Payments to be made in cash and the first-mortgage bonds of the company at sixty cents on the dollar.

It is understood that these bonds are to be eight per cent., and the mortgage to be for nine hundred thousand dollars only. July 18th, 1870.

A.

J. A. Hunt & Co.'s bid, (bonds at par :)

Excavation, common earth	$0	$33\frac{1}{3}$
Embankment	0	$31\frac{1}{3}$
Indurated clay, (very hard)	0	$31\frac{2}{3}$
Rock-excavation	3	$95\frac{1}{3}$
Masonry for box-culvert'	8	3
Paving	5	00
Masonry in arches	33	$33\frac{1}{3}$
Ab't walls for arches	16	$66\frac{2}{3}$
Hard-pan	0	$91\frac{2}{3}$
For iron chains and spikes, we to furnish the same and the company to allow us $8\frac{2}{3}$ per cent. on cost.		
Track-laying, per mile	750	00

JULY 10TH, 1870.

B.

EXHIBIT C, FILED WITH ANSWER.

STATE OF NEW YORK,
City of New York :

DECEMBER 5TH, 1870.

76 Know all men by these presents that we, John A. Hunt and Nathaniel E. Scales, copartners, of the firm of J. Hunt and Co., of Burke County, State of North Carolina, for and in consideration of the sum of five hundred dollars, to us in hand paid before the signing, sealing, and execution of this indenture, by Thomas S. Lutterloh, of the town of Fayetteville, of the State of North Carolina, and the receipt of which is hereby acknowledged, have given, granted, assigned, and set over, and by these presents do hereby give, grant, assign, and set over, to the said Thomas S. Lutterloh, his executors, administrators, and assigns, all our interest, right, title, and claim to a contract entered into between us and the Western Railroad Company, of the State of North Carolina, made and entered into and bearing date the 11th day of October, 1870, being a contract to build said Western Railroad from Egypt to Greensboro', according to the terms in said contract specified, and to

which these presents hereby refers as a part of the same. And we hereby authorize and empower the said Thomas S. Lutterloh to take, hold, and possess all the rights and emoluments to us belonging or appertaining under said contract, in the same and as full a manner and control as we ourselves could do. And we hereby further covenant that we make this conveyance in good faith, with power so to do, and that we have never forfeited or done anything to forfeit our rights under said contract, but the same now remain as at the time of the execution of the same.

We also covenant to do anything and everything that may be necessary in order to complete and carry out the intention of the parties to these presents.

J. A. HUNT & CO. [L. S.]

L. P. BAYNE, *Witness.*

I consent to the above transfer, by order of the president and directors of the Western Railroad Company.

L. C. JONES,
Chief Engineer.

FAYETTEVILLE, N. C., *January 4th*, 1871.

77 EXHIBIT C, FILED WITH ANSWER.

Receipts and expenditures of the Western Railroad Company from 31st October, 1870.

RECEIPTS FROM FORMER ADMINISTRATIONS.

November.

From freight and passengers	$3,242 90
From A. J. Jones, president	1,800 00
	$5,042 90

DISBURSED.

For operating expenses	$3,364 05

December.

Receipts from freight and passengers	2,937 05
Disbursed for operating expenses	3,736 62

January, 1871.

Receipts from freight and passengers	1,817 30
Disbursed for operating expenses	1,399 84

Receipts and disbursements of present administration.

From freight and passengers in February, 1871, including a few days in January	$3,776 50
Disbursed for operating expenses	2,982 84

78 *Receipts and expenditures of financial year, beginning March* 1, 1871, *and ending March* 1, 1872.

RECEIPTS.

From local freights	$30,919 38
From local passengers	10,410 31
From through freight	9,247 55
From through passengers	1,303 00
From mail-pay	1,479 18
	$53,539 42

DISBURSEMENTS.

Expenses of shop	$12,348 52
Expenses of maintenance and repair of road	11,503 37
Expenses of train	13,188 50
Contingencies	1,198 12
Losses and damage to freight	308 51
Salaries	4,241 75
Repair of buildings	32 14
Taxes	797 11
	$43,618 52
Earnings in excess of expenses	9,920 90
	$53,539 42

From which excess of $9,920.90 the sum of $8,068.84 was applied to payment of the debts of former administrations.

79 *Receipts and expenditures of financial year, March, 1872, to March, 1873.*

RECEIPTS.

Local freight	$37,915 07
Local passengers	13,096 76
Through freight	14,354 96
Through passengers	2,562 50
Express freight	353 04
Mail-pay	2,418 90
	$70,701 23

DISBURSEMENTS.

Expenses of train	$18,553 85
Expenses of shop	18,401 38
Expenses of maintenance and repairs of road	14,437 32
Contingent expenses	3,114 33
Losses and damages, (local)	142 97
Stock killed	322 25
Local freight returned	62 51
Repairs of buildings	212 60
Errors and deductions	226 12
Taxes	682 51
Overch'gs, (thro' ft.)	157 59
Loss and damage, (thro' ft.)	112 50
Salaries	5,000 16
	$61,626 09
Excess of earnings over regular expenses	$10,075 14

Which excess of the remainder of 1872 was disposed of as follows:

PAID.

Interest and rent of locomotive	$5,301 31
Purchase of two coaches	2,903 59
Debts of previous administrations	2,523 31
	$10,728 21

80 March, 1873.

RECEIPTS.

Local freight	$4,299 46
Through freight and passengers	1,517 70
Express freight	30 65
	$5,878 46

DISBURSEMENTS.

Maintenance and repair of road	$231 05
Train expenses	878 84
Shop expenses	1,011 10
Contingent expenses	32 45
Stock killed	41 00
Repair of buildings	38 00
Interest account and rent of locomotive to March 1	1,714 19
Salary of executive officers	416 68
Advance on wood contract	100 00
	$5,063 31

April, 1873.

RECEIPTS.

Local freight and passengers	3,665 17
Through freight and passengers	1,670 69
Express freight, (not paid)	
	$5,335 86

DISBURSEMENTS.

Maintenance and repairs of road	$1,346 67
Train expenses	1,819 87
Shop expenses	1,754 49
Contingent expenses	160 80
Repair of buildings	6 60
Salary of executive officers	416 68
	$5,505 21

81 May, 1873.

RECEIPTS FROM EARNINGS.

Local freights	$3,045 49
Local passengers	869 50
Through freight	1,112 34
Through passengers	194 00
Express	23 43
Mail pay	489 26
	$5,744 01

DISBURSED.

Repairs of road	$1,215 95
Train expenses	1,382 40
Shop expenses	1,790 38
Contingent expenses	12 25
Repair of buildings	12 75
Construction of do	146 25
Old debt of previous administration	200 00
	$4,759 98

These figures may be slightly changed upon final settlement with connecting lines for the month. Also,
Received of Wilmington, Charlotte and Rutherford Road. $17,500

DISBURSED.

To J. D. Williams, Lillys, Steel & McKethan, on judgment M. Baird & Co ... $17,500

82 Circuit court of the United States for the eastern district of North Carolina.

HENRY W. HOWELL, ON BEHALF OF HIMSELF and others, *against* RUFUS Y. MCADEN, HENRY J. ROGERS, THOMAS S. LUTTERLOH, The Western Railroad Company, Henry Lilly, Edmund J. Lilly, Alfred A. McKethan, Augustus W. Steel, and I. B. Grainger. } In equity.

The answer of John D. Williams, Edmund J. Lilly, Alfred A. McKethan, and Augustus W. Steel, some of the defendants to the bill of complaint of Henry W. Howell, complainant.

The defendants, now and at all times hereafter saving and reserving to themselves and each of them all benefits and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's bill of complaint contained, for answer thereto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them or any of them to make answer unto, they, these defendants, severally answering, say:

To the first interrogatory: These defendants answering say that the said The Western Railroad Company is a corporation created by act of the general assembly of North Carolina, as set forth in the bill of complaint.

83 To the second interrogatory: By the charter of the said company, and acts amendatory thereof, said company is authorized to construct a railroad from Fayetteville to some point on the North Carolina Railroad, at or between Salisbury and Greensboro', and thence to the Virginia line; and from any point on its road to the Wilmington, Charlotte and Rutherford Railroad, and thence to the South Carolina line. The present termini of the said road are Fayetteville on the eastern end thereof, and Egypt on the western end thereof; and the stockholders of said company, before the making of the deed of mortgage set

forth in the bill of complaint, located the line of said road to be built to Greensboro', on the North Carolina Railroad.

To the third interrogatory: About forty-three miles of said road have been built and operated by said company for about twelve years.

To the fifth interrogatory: By the third section of said act, power and authority was given to said company as set forth in said third section, which reads as follows:

SEC. 3. Be it further enacted, That to enable such company to raise the money necessary to construct and extend said road to some point on the North Carolina Railroad, to connect with said road at such point as may be selected by the Western Railroad Company, or by the president and directors of the same, that said president and directors are hereby authorized and empowered to issue the mortgage bonds of said company, in sums of not less than one hundred dollars each, and not exceeding in amount nine hundred thousand dollars, and to be negotiated at not less than par, and not to mature at an earlier period than thirty years, in sums of not less than one hundred dollars each, payable at such time and place, and at such rate of interest, not to exeeed
84 eight per cent., as may be authorized by said company, and to secure the payment thereof may make a mortgage upon the railroad, and any and all of its property, or income, in such manner and form as they may determine.

To the sixth interrogatory: The stockholders of said company, in general meeting, on the 7th day of April, 1870, by resolution, a copy of which is annexed to the answer of The Western Railroad Company, defendant, marked "A," and is here expressly referred to, did authorise the president and directors of said company to issue the mortgage-bonds of said company and to make a mortgage upon said railroad and all its property, as set forth in the above-named resolutions; but these defendants believe, and so charge, that authority was obtained from said company by reason of the fraudulent misrepresentations of Andrew J. Jones, who was then the president of said company, and Thomas S. Lutterloh and John A. Hunt and others, conspiring with him to cheat and defraud the said company out of all of its property; and by reason of the undue influence exercised by the said A. J. Jones over the State's proxy and the proxies of the county of Cumberland and town of Fayetteville, who were all men easily influenced by the said A. J. Jones, and who held a large majority of the stock in said company; that many of the private stockholders in said meeting protested against the said action, upon the ground that the said A. J. Jones, president, had recently received a large amount of special-tax bonds, to wit, one million three hundred thousand dollars, and had not appropriated the same to the completion of the company's road, and upon the further ground that the president did not intend to build said company's road, but only to further involve the said company; and further, that the contractors, or persons who it was understood were to be contracted with for the completion of said road, were utterly insolvent and could not complete their contract.

And many of the said private stockholders, when they found that,
85 by reason of the preponderance of the vote of the State, county, and town, they were powerless to prevent the perpetration of this injury, refused to vote at all, and withdrew from the said meeting; that, in pursuance of said conspiracy, the said A. J. Jones, then president, and D. J. Underwood and T. S. Lutterloh and W. B. Richardson, a committee appointed by the directors to let out the road to contract, on the 11th day of October, 1870, made and executed a contract with one John A. Hunt, who pretended to act for himself and one N. E.

Scales, as the firm of J. A. Hunt & Co., but the said Scales, according to the information and belief of these defendants, took no part in the making of said contract or in the transferring of the same, as hereinafter set forth, and has known very little about it, he being then a resident of the State of Alabama; that said contract was a fraud upon the rights of the stockholders of said company, and was intended by its makers to result in the sacrifice of all the property and franchises of said company; that its rates were ruinous, and the prices agreed to be given were greater than the offers of several more responsible bidders; that said contractors were known to be insolvent, and were not required to give bond for the faithful performance of their contract; that shortly after said contract was made the said John A. Hunt conveyed and assigned, or attempted to convey and assign, the interest of J. Hunt & Co. in said contract to Thomas S. Lutterloh, who was one of the trustees in said mortgage and one of the committee of directors who had awarded the said contract to J. Hunt & Co.; that by the terms of said contract the said mortgage-bonds were directed to be placed in the hands of an agent to be selected by the president of said company and the contractors, and were to be drawn out of the hands of said agent as the work progressed upon said road; that after the transfer, or attempted tranfer, of the said contract to said Lutterloh, the said A. J. Jones and said Lutterloh procured to be made an arrangement on the part of said Western Railroad Company with the said Lutterloh, which agreement was signed by A. J. Jones, president, W. B. Richardson, director,
86 and D. J. Underwood, a copy of which is hereto annexed, marked "A," by which agreement the said original contract was attempted to be so altered and modified that the whole amount of said bonds might be taken into his possession by the said Lutterloh, except ten thousand dollars of said bonds, which had, upon the signing of said mortgage by the said trustees, been taken into possession by the said McAden and Rogers, the said Lutterloh at the same time taking into his possession five thousand dollars of said bonds; but these defendants are advised, and so charge, that the said attempted modification of said contract was invalid and of no effect, because the agreement was not signed by three of the directors of said company, as was required by the by-laws of said company.

That said Lutterloh did take into his possession four hundred and sixty thousand dollars of said bonds, and took a receipt from L. P. Bayne & Co. for four hundred and twenty-five thousand dollars of said bonds, to be held by the said L. P. Bayne & Co. as collateral security for the payment of a certain acceptance in favor of R. Y. McAden for about twenty thousand five hundred dollars, and for such advances as the said Bayne & Co. might make to the said Lutterloh thereafter. And that, subsequently, the said Lutterloh conveyed and assigned the said contract and the said receipt of L. P. Bayne & Co., and the four hundred and sixty thousand dollars of said bonds, and all his interest in the balance of said bonds, to the Western Railroad Company.

So that by the said fraud and conspiracy all of the said bonds passed out of the hands of the said company without any consideration for the same.

To the seventh interrogatory: That a mortgage, a copy of which is attached to complainant's bill, was made in the month of October, 1870, by Andrew J. Jones, president, and D. J. Underwood, W. B. Richardson, and J. W. Hopkins, directors; and the said mortgage was coun-
87 tersigned by the secretary, one J. H. Davies, and the seal of the company was affixed by the said Davies, and at the same time

Thomas S. Lutterloh, one of the trustees named in said mortgage, signed and sealed the same; and this defendant is informed and believes, and so charges, that at the time of the above recited execution of said mortgage the names of Thomas S. Lutterloh, Rufus Y. McAden, and William R. Utley were set forth in said deed as trustees; and that after the execution, as aforesaid, the name of William R. Utley was stricken out of said deed, and the name of Henry J. Rogers was inserted in its stead; and that said deed was never re-executed by said J. H. Davies, secretary, (who had affixed the corporation seal thereto,) after said alteration had been made.

To the ninth interrogatory: These defendants believe that no funds were ever placed by said company, or by any one else for said company, at the National Bank of the Republic in the city of New York, to pay the interest or any part thereof on said bonds.

To the tenth interrogatory: These defendants are informed and believe, and so charge, that the complainant, Howell, is not the bona fide owner and holder of any of said bonds or coupons.

To the seventeenth interrogatory: In the year 1871, the defendants, John D. Williams, Edmund J. Lilly, Alfred A. McKethan, and Augustus W. Steel, were directors, elected by the individual stockholders in said company; their term of service commenced on the 18th day of January, 1871, and the same persons were elected at the general meeting of stockholders in said company in April, 1871, and were directors in said company until April, 1872, when they were re-elected, and were again re-elected, with the exception of A. W. Steel, in April, 1873. Murdock McKinnon was another director, elected in the year 1871 by the individual stockholders, and was re-elected in 1872, and died during
88 that year or early in 1873. R. P. Buxton, John Reilly, Wm. A. Guthrie, and L. J. Haughton were directors, appointed by the State in January, 1871, and were re-appointed in April, 1871, except the said Buxton, who resigned in March, 1871, and at said general meeting J. R. Lee was elected in his stead.

To the twentieth interrogatory: Judgment was entered against the Western Railroad Company, and in favor of Matthew Baird, surviving partner, at the term of the United States circuit court, and for the amount specified in the bill of complaint and in this interrogatory.

To the twenty-first interrogatory: These defendants, and Henry Lilly, did, on the day of March, 1872, purchase said judgment from the plaintiff Baird, and paid for the same the full amount of said judgment, with interest and costs, and said judgment was transferred and assigned to said purchasers by the attorney for M. Baird, plaintiff.

To the twenty-second and twenty-third interrogatories: The said company did agree to pay to these defendants, and to the defendant Henry Lilly, interest at the rate of eight per cent. per annum, and a commission of two and one-half per cent. upon the renewal of their obligation every ninety days, in consideration that these defendants, and defendant Henry Lilly, should hold the said judgment and not suffer the property of said company or the equity of redemption to be sold under execution; the sum of fourteen hundred and fourteen $\frac{19}{100}$ dollars has been paid in pursuance of said agreement, at intervals of ninety days, since the purchase of said judgment; and on or about the 5th day of May, 1873, the sum of seventeen thousand five hundred dollars was paid, by certificate of deposit of the Bank of New Hanover of that amount, to Henry Lilly, one of the purchasers of said judgment; the said sum was so paid by Isaac B. Grainger, upon the order of the
89 president of said company, the said sum being the amount paid

into the hands of Grainger, subject to the order of said company, as is more fully set forth in the answer of the Western Railroad Company, defendant, to the twenty-sixth interrogatory, which answer these defendants believe to be true.

To the twenty-fourth interrogatory: The execution upon said judgment was in the hands of the United States deputy marshal, and he was about to advertise and sell the property of said company, including its railroad. It was understood and believed by the directors of said company that L. P. Bayne & Co., who pretended to have a large claim against said company, and other parties whose interests were inimical to this community, were anxious that the sale under execution should take place. It was understood and believed, further, that the attorney who represented the said A. J. Jones and L. P. Bayne & Co., and the three trustees in said mortgage, all of whom claimed large amounts against said company, was anxious for the sale; and it was further understood and believed that the said attorney had intimated to the said deputy marshal that if said sale were made the trustees in said mortgage would join with the marshal in conveying a good title to the whole property of said company to the purchaser at said execution sale; and it was further believed that the said mortgage being fraudulent and void, if the whole property and franchises of said company were sold under this execution, notwithstanding the mortgage, the purchaser would get a good title to the whole. Under these circumstances, and after consultation with the board of directors of said company, it was agreed that Messrs. J. D. Williams, A. A. McKethan, E. J. Lilly, and A. W. Steel, and such others as they might induce to advance part of the money, should purchase the said judgment, and afford the said company an opportunity to pay off the same out of the earnings of said company, and thus protect the interests of said company and of the community. These defendants and Henry Lilly paid the whole amount of the
90 judgment, interest, and costs, and took an assignment of the same to themselves.

To the twenty fifth interrogatory: These defendants are informed and believe that two passenger-coaches and a large amount of materials for the use of said company have been purchased and paid for by said company since the execution of said mortgage and are held in the name and for the use of the said company, and that the property of the said company has largely increased in value since the execution of said mortgage. In the year 1872, about the month of October, it became necessary that the said company should have another locomotive-engine to meet the increased demand for transportation upon its road, and the said company being unable to purchase one for cash, these defendants and defendant Henry Lilly purchased a locomotive-engine for the sum of about six thousand three hundred dollars, with their own funds, and have since that time rented the same to said company for the sum of one hundred dollars per month, and the said company have had the possession and use of, but these defendants and defendant Henry Lilly own the said locomotive-engine in their own right.

And the said defendants, further answering, deny that the said complainant is entitled to the relief or any part thereof in the said complaint demanded; and these defendants pray the same advantage of their aforesaid answer as if they had pleaded or demurred to the said bill of com-

plaint; and these defendants pray to be dismissed with their reasonable costs, and in this behalf most wrongfully sustained.

J. D. WILLIAMS.
E. J. LILLY.
A. A. McKETHAN.

SMITH & STRONG,
J. C. MACRAE,
Solicitors for Defendants.

91 UNITED STATES OF AMERICA,
Eastern District of North Carolina:

John D. Williams, Edmund J. Lilly, and Alfred A. McKethan, being each severally sworn, depose and say that they are the defendants named in the foregoing answer subscribed by them; that they have read the same and know the contents thereof, and the same is true to their own knowledge, except as to the matters stated therein on information and belief, and as to those matters they and each of them verily believe it to be true.

J. D. WILLIAMS.
E. J. LILLY.
A. A. McKETHAN.

Sworn to and subscribed before me this 12th day of June, 1873.

A. McPHERSON, JR.,
Clerk Superior Court, Cumberland County.

Circuit court of the United States for the eastern district of North Carolina.

HENRY W. HOWELL, IN BEHALF OF HIMSELF and others, *against* RUFUS Y. McADEN, HENRY J. ROGERS, THOMAS S. Lutterloh, The Western Railroad Company, John D. Williams, Henry Lilly, Edmund J. Lilly, Alfred A. McKeithan, Augustus W. Steel, and I. B. Grainger.	In equity.

92 The separate answer of Henry Lilly, one of the defendants, to the bill of complaint of Henry W. Howell, complainant.

This defendant, reserving to himself all right of exception to the said bill of complaint, for answer to so much thereof as he is required to answer, saith to the first, second, and third interrogatories: This defendant believes that the Western Railroad Company is a corporation created by act of the general assembly of North Carolina, as set forth in the bill of complaint; that the said railroad was built from Fayetteville to Egypt, a distance of about forty-three miles, and has been completed to these termini, and used by said company for about twelve years.

To the fifth, sixth, and seventh interrogatories: This defendant believes that power and authority was given to said company to issue bonds and to make a mortgage, as set forth in said bill of complaint, and that the stockholders, in general meeting, on the 7th day of April, 1870, did direct the bonds to be issued and the mortgage to be made, as set forth in said bill of complaint. This defendant has no copy of the resolutions of said stockholders of said date. This defendant believes that a mortgage was made, or attempted to be made, and that the copy annexed to complainant's bill is a copy of said mortgage.

To the ninth and tenth interrogatories: This defendant has not sufficient knowledge of the facts to enable him to answer.

And to all the other interrogatories which he is required to answer, this defendant says that he has read the answer of the defendants John D. Williams, Edmund J. Lilly, Alfred A. McKethan, and Augustus W. Steel, to the twenty-first, twenty-second, twenty-third, twenty-fourth, and twenty-fifth interrogatories, and this defendant hereby adopts the said answers as his own as fully as if they were herein set out, and refers to the same as his answers to the said interrogatories. And
93 the said defendant, further answering, denies that the said complainant is entitled to the relief, or any part thereof, demanded in the complainant's bill. And this defendant prays the same advantage of his aforesaid answer as if he had pleaded or demurred to the said bill of complaint. And this defendant prays to be dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

HENRY LILLY.

SMITH & STRONG,
J. C. MCRAE,
Solicitors for Defendant.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

Henry Lilly, being duly sworn, does depose and say that he is the defendant named in the foregoing answer subscribed by him; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those matters he verily believes it to be true.

HENRY LILLY.

Sworn to and subscribed before me this 12th day of June, 1873.
A. MCPHERSON, JUN., *Clerk S. C.*

94 Circuit court of the United States for the eastern district of North Carolina.

HENRY W. HOWELL, ON BEHALF OF HIMSELF and others, *against* RUFUS Y. MCADEN, HENRY J. ROGERS, THOMAS S. Lutterloh, The Western Railroad Company, John D. Williams, Henry Lilly, Edmund J. Lilly, Alfred A. McKethan, Augustus W. Steel, and Isaac B. Grainger.	In equity.

The separate answer of Isaac B. Grainger, one of the defendants, to the bill of complaint of Henry W. Howell, complainant.

This defendant, reserving to himself all right of exception to the said bill of complaint, for answer to so much thereof as he is required to answer, saith, to the twenty-seventh interrogatory: that no second-mortgage bonds of the Wilmington, Charlotte and Rutherford Railroad Company, and no other bonds of any kind, were ever transferred to him by the Western Railroad Company, or by any one else, for any purpose whatsoever. And this defendant has never agreed to dispose of any bonds for said Western Railroad Company for any consideration whatsoever, or without consideration.

This defendant knows nothing of said bonds of his own knowledge, has never had any bonds in his possession, and has no knowledge of any disposition of said bonds.

This defendant did, in the month of April, 1873, receive the sum of seventeen thousand five hundred dollars from the representatives of the holders of the bonds of the North Carolina Railroad Company, to be
95 paid over to the Western Railroad Company, and this defendant did, on or about the third day of May, 1873, upon the order of L. C. Jones, president of the said Western Railroad Company, and by direction of the attorney of said company, deposit the said sum of money in the bank of New Hanover, to the credit of Henry Lilly, and subsequently to said deposit the said amount of money was checked out of said bank by the said Henry Lilly, and this defendant has no knowledge further of the matters set forth in complainant's bill.

And this defendant, having answered all of the said bill which he is advised it is material for him to answer, prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

ISAAC B. GRAINGER.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

Isaac B. Grainger, being duly sworn, does depose and say, that he is the defendant named in the foregoing answer subscribed by him; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge.

Sworn to and subscribed before me this 9th day of June, 1873.

E. H. McQUIGG,
U. S. Commissioner, Dist. of North Carolina.

96 And afterwards, to wit, at June term, 1873, of this court, the following proceedings are had in this cause:

Order vacating the injunction.

In circuit court of the U. S. for the 4th circuit and eastern district of North Carolina.

HENRY W. HOWELL ET AL.
vs.
RUFUS Y. McADEN ET AL.

Ordered by the court that the order for an injunction in this cause heretofore granted be, and the same is hereby, vacated.

HUGH L. BOND,
Ct. Judge.

97 *Order appointing Joseph B. Batchelor commissioner.*

Circuit court for the eastern district of N. C., in equity, June term, 1873, of Raleigh.

HENRY W. HOWELL
v.
THE WESTERN RAILROAD COMPANY, JOHN D. Williams, and others.

It is ordered by the court that Joseph B. Batchelor, esq., be appointed

a special commissioner to take the testimony in this case and report the same, with his finding thereon, by the 15th day of September, 1873. It is ordered further that the complainant have leave upon the coming in of the report of said commissioner, to apply to the judge of the circuit court or to the judge of the district court for this district, at chambers, to appoint a receiver, or to make such other interlocutory order or decree as he may be advised to ask for. And the said special commissioner shall give to each of the parties hereto twenty days' notice of the time and place of the taking of said testimony.

HUGH L. BOND,
Ct. Judge.

98 *Further order to the commissioner.*

Circuit court for the eastern district of N. C., in equity, June term, 1873.

HENRY W. HOWELL
vs.
THE WESTERN RAILROAD COMPANY, JOHN D. WILLIAMS, and others.

It is ordered that the referee, Joseph B. Batchelor, appointed in this cause at the present term, consider, in making up his findings of the facts or issues referred to him, depositions which may be taken in the cause under the general rules for taking depositions.

G. W. BROOKS,
Dist. Judge.

99 *Evidence taken in the foregoing action before J. B. Batchelor, commissioner, &c.*

Both parties being present by their attorneys, to wit, Merrimon, Fuller & Ashe, for plaintiff, and Smith & Strong and J. C. MacRae, for the defendants.

It is agreed that the five bonds sued on in this action were the five bonds which Henry J. Rogers received from A. J. Jones, as president of the Western Railroad Company, as compensation for his (Henry J. Rogers') services as one of the trustees to the mortgage, and that he (Rogers) paid no other compensation or consideration for said bonds.

The following evidence is offered in behalf of the plaintiff:

1. The various acts of the general assembly which make the charter of the Western Railroad Company.

(Pamphlet copy filed.)

2. Copy of resolution of the stockholders of the Western Railroad Company, April 7th, 1870. Filed as an exhibit, and marked "A," with plaintiff's complaint.

3. The deed of mortgage made under said resolution, and the act of assembly authorizing the same, registered in Cumberland County, Oct. 31st, 1870.

4. Five bonds of one thousand dollars each, as described in the bill.

5. The plaintiff also, in reply, put in evidence a transcript of the suit of M. Baird, surviving partner of M. W. Baldwin & Co., against the Western Railroad Company, in which was rendered the judgment against the company spoken of as the Baldwin judgment.

ROBERT M. ORRELL, witness for the plaintiff, being duly sworn, deposes and says as follows:

I reside in Fayetteville, where I have resided for 34 years last past. I know the Western Railroad; I was a director of the Western Railroad in the year 1866, and during part of the year 1872 I was assistant freight agent of said road at Fayetteville. The general reputation of the Western Railroad Company is that it is insolvent. It has a floating debt of about $40,000, and a bonded debt of about $425,000, with interest thereon, which is covered by this mortgage. The par value of the stock in said company is $100 per share; the selling price is from $1.65 to $2.50 per share. Before the execution of this mortgage the selling price was about $18 per share, I think. I am a stockholder in the Western Railroad Company, and was an original subscriber. The road has never paid any dividend that I ever heard of; I was never paid any div-
100 idend on my stock. I know nothing particular of the management of the road within the past two years, but think it was managed as well as it could be. I have heard nothing of the management of the road. I only supposed that the president and superintendent were getting all the business they could for the road, and managing it as cheaply as they could.

Cross-examination:

I have been an employé of the road within the last two years, and have had an opportunity of knowing something about the general management of the road. As far as my observation extended, the employés of the company were paid regularly, but there were judgments against the road which they could not or did not pay. These judgments were part of the $40,000 floating debt already mentioned. It has been generally rumored that the income of the company has been employed in the purchase of rolling-stock, which is now the property of certain individuals who are, or have been, directors in the company. There is an addition of ten per cent. or more in value of rolling-stock within the last two years; whether it belongs to the company or not I don't know. I don't think any improvements have been added to the real estate which make it more valuable than it was two years ago. I don't think the road would sell for $565,000. Capitalists would not give $100,000 for it as an investment, as it pays nothing. I have no idea what the iron is worth even as old iron. I have never calculated the value of material on that road. My idea of the value of a railroad is based on the dividends it will pay. I own seven shares of stock.

R. M. ORRELL.

Sworn and subscribed before me this 6th day of August, 1873.

JOS. B. BATCHELOR,
Commissioner.

WILLIAM R. LOVE, a witness for the plaintiff, being duly sworn, deposes and says as follows:

101 I reside in the town of Fayetteville, in the county of Cumberland, and have resided there all my life—a little over 52 years. I know the general reputation of the Western Railroad Company with regard to solvency. It is insolvent. The selling price of the stock during the past three years has been from $2.17 to $2.60. The company has never paid a dividend. I don't recollect what the selling price of the stock was before the execution of the mortgage, but it was selling very low.

Cross-examined:

This is still an unfinished road. The company is said to owe a bonded debt of $425,000, which is the debt covered by this mortgage. I gather from the report of the secretary of the company that it is indebted to the extent of about $40,000 in addition to this bonded debt. I have some idea of the value of the property of the company. I think that the road and the rolling-stock ought to be good for the debt. By the debt I mean the $425,000 bonded debt as well as the $40,000 floating debt; but if the road were put up to-day for cash I know of no capitalists who would pay more than $200,000 for it. I have no connection with railroad matters. I form my opinion of the value of railroad property from general rumor and from extensive travel, having since 1851 travelled over most of the roads in the United States. For the last five years my travels have been confined to North Carolina, and during that time I have been on every road in North Carolina, except the little Tarboro' road. My business has lately been deputy U. S. marshal. I am now dealing in liquors by the small, and keeping a bar-room.

My travelling has not led me to look into the financial management of railroads.

W. R. LOVE.

Sworn and subscribed before me this 6th day of August, 1873.

JOS. B. BATCHELOR,
Commissioner.

102 The following witnesses were then introduced on behalf of these defendants, viz: the Western Railroad Company, John D. Williams, E. J. Lilly, A. A. McKethan, Henry Lilly, A. W. Steel, and Isaac B. Grainger.

JOHN M. ROSE, a witness for said defendants, being duly sworn, deposes and says as follows:

I am the secretary of the Western Railroad Company, and have been since its organization in 1853 up to the present time, except parts of the years 1869 and 1870. The paper now produced and filed, marked "Exhibit A, J. M. Rose," is a true copy of the proceedings of the meeting of the board of directors of the Western Railroad Company held on the 13th day of August, 1870.

(Evidence of the appointment of this committee objected to by the plaintiff.)

The paper now produced and filed, marked "Exhibit B, J. M. Rose," is the original contract between the Western Railroad Company, by its committee, and J. Hunt & Co., for the building of its railroad track, a true copy of which is filed with the answer of the Western Railroad Company, except as to some of the specifications, which are not copied. The paper filed with the answer of the Western Railroad Company, and purporting to be an assignment of the above-mentioned contract by J. Hunt & Co. to T. S. Lutterloh, is a true copy of the original assignment now in my possession.

L. B. Payne lives in New York.

The paper now produced and filed, marked "Exhibit C, J. M. Rose," is a true copy of the modification of the original contract with J. Hunt & Co.

I sent by mail an advertisement, of which the paper now produced and filed, marked "Exhibit D, J. M. Rose," is a copy, to the Wall Street Journal, Journal of Commerce, and the World, newspapers published

in the city of New York, with a request that each of the said
103 papers would insert the said advertisement for three or four weeks in its columns, and I saw in the office of the company copies of these newspapers, purporting to be published in New York, with the said advertisement in them. I saw it at intervals for three or four weeks thereafter in said papers. The advertisement was first inserted in the Fayetteville Eagle, and I had three copies struck off on slips, and sent one to each of the above-named papers. It was the same in all the papers, and was the same with the copy here given. I have now no copy of either of the papers in which it was published. I also sent a copy of the advertisement to L. P. Bayne & Co., of New York, in a letter through the post-office, with the postage paid, and shortly after a letter was received by the president of the company, enclosed in an envelope, with the business address of L. P. Bayne & Co. printed thereon, and written on a sheet of paper having the business card of L. P. Bayne & Co. printed at the top thereof, and signed "Henry J. Rogers." This letter has been lost or mislaid, and cannot be found after diligent search. I am not acquainted with the handwriting of Henry J. Rogers, and do not know whether the letter was signed by him or not. The receipt of said advertisement was acknowledged in said letter.

(This evidence as to the advertisement objected to by the plaintiff.)

The Wall Street Journal, Journal of Commerce, and World are papers having an extensive circulation in New York.

Andrew J. Jones became president of the Western Railroad Company on April 1, 1869, and the following persons composed the board of directors: On the part of the State, Andrew J. Jones, John H. Davis, William B. Richardson, James S. Harrington, P. A. Byrnes, J. A. McDonald, Joel Ashworth; and on the part of individual stockholders, D. J. Underwood, J. W. Hopkins. None of these persons were stockholders in the Western Railroad Company on the morning of the 1st day of April, 1869. On that morning R. M. Orrell transferred four shares of
104 stock to J. W. Hopkins, T. S. Lutterloh transferred ten shares of stock to Andrew J. Jones, and five shares of stock to each of the other parties. I think this was on the morning of the 1st of April, 1869.

Upon the organization J. H. Davis resigned his position as director, and Thomas S. Lutterloh was appointed in his stead. Mr. Davis was elected secretary and treasurer of the company.

The paper now produced and filed, marked "Exhibit E, J. M. Rose," is a copy of the laws adopted by a general meeting of the stockholders held on May 5, 1869, which were in force up to January 18, 1871. I was present at the meeting of the stockholders when the resolution authorizing the mortgage was passed. I was chairman of the meeting. This meeting took place on the 8th of April, 1870. The resolution was offered in the morning, and was passed in the afternoon of the same day. George A. Graham represented the State as its proxy in this meeting, upon a commission dated twelve months previous thereto. Late in the evening of the same day, and after the resolution had passed, Andrew J. Jones produced a commission from the governor, dated two days previous, to James R. Lee, as proxy, to represent the State. On the same evening, after the production of this commission, a resolution was introduced, a copy of which, with the resolutions had thereon, is herewith filed, marked "Exhibit F, J. M. Rose," taken from the records of the company.

On the passage of this resolution a stock-vote was called. J. R. Lee, the proxy of the State, voted in the affirmative, and, that being a majority of the votes to be cast, all of the individual stockholders present,

in number from 100 to 150, declined to vote, except George A. Graham, owning five shares, and Wm. B. Richardson, owning five shares, who recorded their votes in the negative. The roll of individual stockholders was not called. After the vote of the State was given in behalf of the resolution, a number of the stockholders said that they would not take part in any such proceedings, and others said that the
105 resolution was carried any way, and that there was no use in calling the roll, and the roll was not called. Immediately thereafter the meeting adjourned.

In the debate on the resolution authorizing the mortgage and the issue of bonds, Andrew J. Jones, the president of the road, urged the passage thereof, and said that if the bonds were placed in his hands he could make arrangements for the completion of the road, and that he could and would account for the bonds then in his hands. He made these representations to stockholders outside as well as in the meeting.

George A. Graham, who represented the State as its proxy, was, I think, under the influence of liquor at this meeting. When the commission as State's proxy to James R. Lee was produced, Graham became very much excited.

Before the contract was made between the Western Railroad Company and J. Hunt & Co., I and A. A. McKethan went to A. J. Jones, the president of the road, and protested against his making the contract with Hunt & Co. I informed Mr. Jones that I had seen an advertisement for the sale of the property of Hunt & Co., under proceedings in attachment in one of our western counties.

(Objected to.)

I think that Thos. S. Lutterloh and A. J. Jones were on terms of particular intimacy. They were together a great deal. I made the same statement to T. S. Lutterloh with regard to the insolvency of Hunt & Co., and protested to him against the making of the contract.

(Objected to.)

Mr. Underwood, who was one of the committee on contract, appeared to be completely under the influence of Messrs. Lutterloh and Jones.

The defendant now proposed to prove the assignment of the contract between J. A. Hunt & Co. and the Western Railroad Company by the following evidence of Mr. Rose:

106 Mr. Rose, in answer to interrogatories, said:

I have seen letters addressed to the firm of L. P. Bayne & Co., and letters received in reply thereto, and thereby I think I acquired a knowledge of the signature of the person who signed the name of L. P. Bayne & Co. to those letters. It is the same as the signature of L. P. Bayne, the subscribing witness to the assignment. I have also seen a signature purporting to be the signature of Henry J. Rogers, the other member of the firm of L. P. Bayne & Co. It was to a letter in reply to a letter to L. P. Bayne & Co., and is not the same handwriting as that of the subscribing witness to the assignment.

From letters received from John A. Hunt, and from a signature acknowledged by Jno. A. Hunt to be his own, I think I have acquired a competent knowledge of the handwriting of John A. Hunt, and the signature of J. A. Hunt & Co. to the said assignment I believe to be in the handwriting of John A. Hunt. I know the handwriting of L. C. Jones, who was chief engineer of the Western Railroad Company in January, 1871, and the consent appended to the said assignment is in the handwriting of L. C. Jones.

Cross-examined as to the assignment:

I do not know who wrote the letters signed L. P. Bayne & Co. Of my own knowledge I don't know whether the firm of L. P. Bayne & Co. consisted of two members or a dozen. I only know that the heads of the letters I saw had the words "L. P. Bayne" printed in one corner and the words "Henry J. Rogers" printed in another, and the words "Office of L. P. Bayne & Co." printed in the middle. I have never received a letter signed L. P. Bayne & Co., and I never wrote a letter to L. P. Bayne & Co.; but I have written the body of letters to their firm, which were signed by the president of the company. I never saw Hunt write. I once heard Hunt acknowledge the signature to a contract, which contract I have, but the signature was not exhibited to Hunt at that time nor at any other time by me. I never had any
107 correspondence with Hunt. I never wrote him a letter, and never received a letter from him. My knowledge of Hunt's handwriting is derived from a comparison of the signature to the assignment to the contract with the signature to the original contract, and from my general knowledge of his handwriting acquired by seeing the signature of Hunt to letters addressed to T. S. Lutterloh, purporting to be signed by Hunt. I do not know that the signatures of the letters addressed to Lutterloh were Hunt's signatures. I do not know that the letters were replies to letters written him by Lutterloh, and I do not know that Lutterloh ever received such letters either by mail or otherwise; so that if the signatures of Hunt to the Lutterloh letters are not genuine, then my knowledge of his handwriting rests alone on the comparison that I have made between the signature to the original contract as this assignment thereof. I can form an opinion of the writing of Hunt from my knowledge of the signature to the original contract, which he admitted he had executed.

Redirect:

The Western Railroad Company owes a floating debt of about $16,000. The company has no other liabilities, except what may be due upon the mortgage-bonds, if anything, and the current expenses which are incurred and paid from day to day. The property of the road was valued for taxation to the governor during the present year at $900,000. The road and rolling-stock are in fine condition.

(Further examination and cross examination of the witness postponed until

JNO. M. ROSE.

Sworn and subscribed before me this 7th day of August, 1873.

L. C. JONES, a witness for the defendants, being duly sworn, deposes and says as follows:

I am 42 years of age. I reside in Fayetteville, N. C.; have lived
108 there about 16 years. I first became connected with the Western Railroad Company as assistant engineer, to superintend the laying of the track. After that I was resident engineer, and had entire control of the construction of about 16 miles of the road, and of the completion of the last 20 miles of the road, subject to the approval of the chief engineer. About 1860 I became chief engineer of the road, and in that capacity had entire control of the construction of the road. About the middle of the war I was also made superintendent of the road, and held the positions of chief engineer and superintendent until the meeting of the stockholders of the road in January, 1871, when I was made president

of the road, and have since held that position. During the war I was absent about six months. I have thus become thoroughly acquainted with the construction of the road and its condition in all respects. The length of the main stem of the road is 43 miles. To lay the track requires 5,560 tons of iron, at 50 pounds to the linear yard. I think, all things considered, that the iron on the road is worth $65.00 per ton, making the present value of the iron $210,300, and this it would bring at a sale, and the chains and spikes are worth $13,300; I mean they could not be replaced with new ones for less than that. The rolling-stock and other property of the road, except the real estate and the property already deposed to, is worth about $40,000. The real estate of the road, including workshops, depots, and water-stations, &c., and not including the road-bed, is worth, I think, about $16,000. The road-bed and cross-ties are worth $659,000, the cross-ties being worth $9,000. I value the road-bed at what it would cost to construct it now. The condition of the superstructure of the road is very good. I don't think there is another road in the State, of same length, in better condition. The rolling-stock is in good condition. The motive-power is in fair condition. The balance of the rolling-stock is in very good condition.

The original cost of the construction and equipment of the road was about $1,100,000. Since I became president of the company there
109 has been expended in improving its property and works, and in paying old debts, (outside of the ordinary annual expenses of working and keeping up the road,) about $36,000. This is exclusive of $6,300 paid for cross-ties, one-half of which is over the number which ought to have been required if the road had been kept in proper condition during the two previous years. About $11,300 of the above sum was paid for old debts contracted before the present administration.

The general condition of the road is better by 25 per cent. than when I took it, except the ordinary wear and tear of the iron.

I think, at a fair cash sale of the road, with a good title and clear of incumbrances, and with all its chartered privileges, it would sell for $400,000.

I think the road, including everything, is worth $900,000. It was returned for taxation to the governor of the State at that sum. All the property which has been purchased by the funds of the company is now owned by the company, and now stands in the name of the company. We have a locomotive, which belongs to J. D. Williams, A. W. Steel, A. A. McKethan, E. J. Lilly, and Henry Lilly. The company needed a locomotive very badly, and did not have the funds to pay for it, and could not get them. These gentlemen, not knowing what would be the result of the litigation growing out of the mortgage, would advance no farther funds, but bought a locomotive and hired it to the company at extremely low rates. The locomotive was purchased with their funds entirely and exclusively. The company pays $100 per month for the hire of the locomotive.

Mr. Lutterloh returned $460,000 of the mortgage-bonds to the company. He was to have returned $5,000 more, but up to this time he has not done so.

A. J. Jones is dead. He died about four months ago.

I was chief engineer of the Western Railroad at the time A. J. Jones was president. At the time Hunt made his bid there was also a bid from Martindale & Co. for the construction of the road from Egypt to
110 Greensboro'. There was a bid at the same time from L. J. Haughton, of Chatham County, for the construction of the road from Egypt to Ore Hill. Mr. Haughton's prices ranged but a little higher

than the estimates made by the chief engineer. Martindale & Co. offered to do the work for about $80,000 less than Hunt's prices, and to receive payment in first-mortgage bonds of the company, allowing for the bonds $90,000 more than Hunt proposed to take them at, making an aggregate difference to the company of $170,000 between the bids.

After the bid of Martindale & Co. and Haughton had been received, A. J. Jones, president, went to New York. When he returned he handed me a bid from J. A. Hunt & Co. on the work, and asked me to write to Hunt, who was in Alabama, to come on, that his bid would be favorably considered by the directors. I glanced over the bid, and replied to the president that it ought not to be accepted without considerable modifications, and called his attention to the prices for rock, which were about $25,000 more than the engineer's estimate. Upon further examination of Hunt's bid, I found that it was $80,000 more for the work than Martindale & Co.'s bid, and $90,000 difference in the price of the bonds, Martindale agreeing to take the bonds at 70 cents, and Hunt only at 60 cents. Martindale & Co.'s bid was about as low as the estimate of the engineer. I called Mr. Jones's attention to this difference in the bids, and also to the part of the bid referring to the purchases of iron, which I thought ought to be rejected. In the meeting of the board of directors when the several bids were under consideration, A. J. Jones said he was opposed to accepting the bid of Drane & McDowell, because they were too high, and Drane had been a partner of his, and if he gave them the contract it would be said to be his (Jones's) contract; that Haughton could not do the work at his prices; that Martindale & Co. were carpet-baggers, and if the contract was given to them the odium would be attached to them and the board of directors; that J. A. Hunt & Co. were responsible men, he believed, and would do the work, and
111 he preferred to let them have the contract. After the meeting of the board of directors Hunt came on, and the contract was closed with him, being signed in Mr. Fuller's office. Hunt went to work shortly after signing the contract, and worked from that time until the transfer of the contract from him to Mr. Lutterloh took place. Date of the transfer is Jan. 1st, 1871.

Mr. Lutterloh returned from New York the latter part of December, 1870, and told me that he had bought Hunt's contract for $500, and said to me that it was necessary that I should consent to the transfer of the contract, and handed me the papers containing the contract. I made no reply, but returned him the papers. On the day the transfer was approved, I asked Mr. Lutterloh not to insist upon my signing the transfer, as within a few days a new organization would declare Hunt's original contract null and void, and consequently the transfer would be worthless. I then said I would not consent to sign the transfer unless it was ordered by the board of directors.

(Objected to.)

The board of directors was convened on January 14, 1871, and was composed of A. J. Jones, president, T. S. Lutterloh, D. J. Underwood, John A. McDonald, and J. W. Hopkins, and passed a resolution directing me to approve the contract. I did so in the following language: "I consent to the above transfer, by order of the president and directors of the Western Railroad Company."

I protested against it, because of reasons above stated, and had determined to resign my position as chief engineer rather than do it, but was dissuaded from that step by friends who were large stockholders in the company, and advised by them to consent to the transfer, if ordered to do so by the board of directors, rather than resign, in order that there

might be somebody to aid the private stockholders in getting possession of the road in case there should be a re-organization.

(Objected to.)

112 A. J. Jones, and T. S. Lutterloh seemed to be the most prominent directors on the board during the administration of A. J. Jones. The modifications in the contract spoken of were made after its assignment by Hunt & Co. to Lutterloh. At what precise time, by whom, or for what assigned reason they were made I do not know.

Mr. Lutterloh, at the time of these modifications, was a member of the board of directors, and continued so until the re-organization of the company.

Q. Did Mr. Lutterloh get possession of the mortgage-bonds; if so, in what character, and what has he done with them?

A. At the time of the transfer he was already trustee, and by that transfer he became contractor; the modification made him both contractor and agent, and he got under his control the whole $900,000 of the first-mortgage bonds. The company threatened to prosecute him, whereupon he surrendered $460,000 first-mortgage bonds.

The remainder I understand to be in the possession of L. P. Bayne & Co., of New York, subject to a claim of $20,000, money alleged to be advanced by A. J. Jones to Hunt & Co.

A. A. McKethan, a witness for the defendants, being duly sworn, says:

I reside in Fayetteville, and am a director of the Western Railroad Company, which position I held from the organization of the company up to 1869, and again from 1871 up to the present time. I was present at the meeting of stockholders at the time of the passage of the resolution authorizing the mortgage.

(The plaintiff objected to the evidence as to A. J. Jones's advocacy of the resolution.)

Andrew J. Jones, the president of the road, advocated the passage of the resolution in and out of the meeting. He represented that if

113 said mortgage were made the road would soon be completed to Greensborough. The resolution was, I think, offered by T. S. Lutterloh. It was on account of the influence of Messrs. Jones and Lutterloh and others, who had the road in charge, that the resolution was passed. There was strong opposition on the part of the individual stockholders. At the commencement of the meeting there was no new State proxy presented, and Mr. George A. Graham, who had been the proxy for the past year, represented the State, and voted for the resolution. Some time after the vote on the said resolution was taken, Mr. A. J. Jones produced a new commission as State proxy, directed to Mr. J. R. Lee, after which a vote was taken to change the location of the road.

Late in the evening of the same day a resolution ratifying all the proceedings of the meeting had on that day was introduced, and passed by the vote of the State's proxy.

There was great opposition to the mortgage on the part of the individual stockholders. The objection was made that it was unnecessary to mortgage the road, because the president of the road had received $1,300,000 of State bonds which had not been accounted for. It was charged that these State bonds had been squandered, and the road had received no benefit therefrom, and that the bonds of the road would be disposed of in the same manner.

(Objected to.)

A. J. Jones and the State's proxy and the other directors acted in concert until the vote was taken changing the location of the road, when Mr. Graham became much incensed.

Before the contract was made with J. A. Hunt & Co. I had a conversation with J. A. Hunt. I informed him that the contract was intended to be a swindle, and advised him to have nothing to do with it.

(Objected to.)

114 I also had a conversation with A. J. Jones on this subject. I told him that Hunt was a broken-down contractor; was worthless, and could not carry out the contract. Mr. J. M. Rose was present at this conversation, and joined me in my statements.

(Objected to.)

T. S. Lutterloh applied to me before the contract was made to join him in taking the contract; he also said that he wanted to get Mr. Williams to join in taking the contract. I replied to Mr. Lutterloh that we had been directors together for a long time, and knew that contractors generally made no money. Mr. Lutterloh said that the condition of affairs was now different; that on account of his intimacy with A. J. Jones he could get such a contract as would enable me to make $5,000 without leaving my office, and probably thousands more. He said that he merely wished to use my name and that of Mr. Williams, to give character to the contract, and that we could make money without any trouble on our part.

(Objected to.)

Cross-examined:

The meeting of stockholders in which the resolution authorizing the mortgage was passed was held in April, 1870. I don't remember the day of the month. I have forgotten who was chairman of the meeting. I can't remember who was secretary; my impression is that J. H. Davis was. It was a full house. Including the State, county, town, and individual stock, a large majority of the stock of the road was represented It was generally understood that this meeting was to mortgage the road, and this called out a large majority of stock. I think that two-thirds of the indvidual stock was represented. I have never seen but one larger meeting of the stockholders since the war, that I recollect. I can't recollect whether the meeting continued one day or longer. My im-

115 pression is that it continued only one day. The resolution authorizing the mortgage was introduced early in the meeting—in the fore part of the day, I think.

It was thoroughly discussed. No attempt was made to stifle discussion on the resolution; but the stock vote being called on each proposition, and the representatives of the State, county, and town voting on each proposition in favor of the resolution, those who opposed the resolution could carry none of their propositions. I cannot recollect whether or not the first vote on the resolution was on a motion to lay the same on the table by one who was opposed thereto, but I do know that a motion to lay on the table was made by a stockholder who was opposed to the resolution, and voted down by a stock vote. I think it was John W. Baker, jr., a stockholder, who was opposed to the resolution, who called for a stock vote. I can't say whether or not a majority of the stockholders other than State, county, and town voted for or against the motion to table. After the motion to table was voted down, there was another discussion on the merits of the resolution. I don't think any one was prevented from speaking who could get the floor. I think that

a very small portion of the private stock was voted in favor of the resolution on its final adoption, most of the private stockholders having left the meeting after the motion to table was voted down. I don't know whether the vote on the adoption of the resolution was or was not larger than that on the motion to table.

I have already said that those who favored the resolution acted in concert. I don't know whether or not those who opposed the resolution acted in concert. I don't think they did.

Re-examined:

In the morning I opposed the passage of the resolution authorizing the mortgage, and stated that if it were passed my stock would not be worth one cent. During the adjournment I was approached by A. J. Jones, who proposed to buy my stock, and said that as I was opposing the mortgage he wanted to get rid of me in the meeting.

116 (Objected to.)

When John W. Baker moved to lay the resolution on the table, he made a speech against the resolution, charging fraud, and said that he wanted to make them show their hands.

(Objected to.)

By concert of action between A. J. Jones and others, I mean that there appeared to be a common understanding between them. It was reported to me that there was a common understanding between them, and their actions during the day were such as to confirm the idea.

(Objected to.)

A. A. McKETHAN.

JOHN D. WILLIAMS, a witness for the defendants, being duly sworn, says:

I am a director in the Western Railroad Company, and have been since January, 1871. I was a director for several terms before 1869.

I was present at the meeting when the resolution authorizing the mortgage was offered.

I think that the whole organization of the road at that time were prominent in urging the adoption of the resolution. A. J. Jones made liberal promises, both in and out of the meeting, to build the road if the mortgage were made.

(Objected to.)

There was spirited objection on the part of private stockholders, upon the ground that there was no necessity, at that time, for making a mortgage, because the president had in his possession, unaccounted for, a large amount of State bonds.

J. D. WILLIAMS.

MATTHEW ATKINSON, a witness for the defendants, being duly sworn, says:

117 My name is Matthew Atkinson. I am master machinist in the employ of the Western Railroad Company. The general condition of the rolling-stock of the road, especially the motive-power, was bad when L. C. Jones became president, in January, 1871. Since that time considerable improvement has been made in the condition of the rolling-stock and motive-power.

The paper produced and filed, marked "Exhibit A, M. A.," is a report made by me, as master machinist, of the improvements made in my department since February 13th, 1871, and I adopt the same as part of

my deposition. Since this report was made we have continued to make improvements, and are now engaged upon a construction train, upon which we have completed five cars, and intend to build five more. Outside of my department, a large coach-house has been completed since my report was made.

Cross-examined:

Since the close of the war I have been on the road almost continuously. I don't recollect that any new iron has been put on road since the war. The road has not been extended since the war, except a short cut between the former terminus of the road at Egypt and the river, which was made in Andrew J. Jones's time.

The engine called the Clarendon was bought from the Germantown branch of the Reading Railroad Company. It was bought about July, 1872. It was bargained for by L. C. Jones and myself. The price paid was $6,500. I was acting for the Western Railroad as far as I knew. I don't know who Mr. Jones was acting for. It was paid for by two or more drafts. I don't know who signed the drafts, but I don't think they were signed by the Western Railroad Company. I think the engine was consigned to John D. Williams. At the time of purchase she had no name, but was numbered 347. I don't know who named her the Clarendon. An engine such as that could be run for an indefinite period. The passenger-coaches were purchased by
118 myself last November. They were paid for by the Western Railroad Company. The cost at Philadelphia was $2,600 for both. The percentage of railroad-engines in use blown up is very small.

Re-examined:

On the three upper sections of the road there is no perceptible wear in the iron. On the first section I consider the iron as half worn out. Some wear is perceptible on the second section. The road is divided into five sections of about equal length. Two regular trains run on the road daily. The first section will last ten years or more. I know nothing about who the "Clarendon" was bought for. I was simply sent to inspect the engine. According to my judgment, the engine was worth $2,000 more than we gave for it. The owners of that engine were replacing their engines with larger and more powerful engines, and were selling out their old stock. The passenger coaches are worth $2,500 apiece. They have been thoroughly repaired. They were also bought at a bargain, because the company who owned them were selling out their old cars and replacing them with finer ones. They were valued at $2,500 each in the transfer from the Camden & Amboy to the Pennsylvania Central. I don't think $100 a month is too large a price for the hire of a locomotive. When I said that an engine would run for an indefinite time, I had in view that proper repairs should be made as they were needed.

This is a 24-ton engine. The repairs to the engine are to be made by the Western Railroad Company while we are using it.

M. ATKINSON.

D. G. MACRAE, a witness for the defendants, being duly sworn, deposes and says:

I am a resident of the town of Fayetteville. I was present at the meeting of the stockholders of the Western Railroad Company which authorized the mortgage of the road. The resolution was introduced by T. S. Lutterloh.

Andrew J. Jones represented that it would be to the best in-
119 terests of the road to make the mortgage, and that the proceeds thereof would be appropriated to the construction of the road. I think that Jones went farther, and said that if the mortgage was made the road would be built.

There seemed to be strong combination on the part of Jones and the directors to pass the resolution and mortgage the road. During the morning of the meeting George A. Graham represented the State as its proxy, while at the same time A. J. Jones, the president, had in his pocket a new commission of State's proxy, directed to James R. Lee, which was not given to Mr. Lee until late in the afternoon, after the passage of the resolution.

(Objected to.)

I was not present when the ratifying resolution was passed. I had become disgusted, and had left the meeting. I was prominent in my opposition to the adoption of the resolution, and charged that it was intended as a fraud on the company, and that if this was carried out the stockholders would never derive any benefit from their stock. When I saw they intended to pass the resolution, I proposed the names of three of our own citizens, in whom we had confidence, as trustees in the mortgage, but this proposition was disregarded.

(Objected to.)

The State directors, with the exception of Mr. Lutterloh, were non-residents of the county of Cumberland and town of Fayetteville, and had no interest in the road as I understood, except that they had borrowed stock from Mr. Lutterloh to qualify them as directors in the company.

(Objected to.)

The whole directory and the representatives of the State, county, and town seemed to be under the influence of A. J. Jones.

(Objected to.)

120 Cross-examined:

The resolution authorizing the mortgage of the road was fully and freely discussed. Mr. McKethan and myself, with others, made strong and violent speeches in opposition thereto. No effort was made to choke or stifle discussion. The resolution was finally adopted by a large majority, including a majority of the private shares of stock, the number of votes against it being less than one hundred shares. I think that by general reputation the road is solvent, considering the bonded debt as valid, and I think the road would sell for more than it owes. I think it would sell for six or $700,000. The stock ranges from $3 to $6 or $7 per share. The road has never paid a dividend.

Direct examination resumed:

My impression is that a large number of stockholders refused to vote on the resolution, for the reason that it was understood that the State, county, and town vote was united, and that it was useless for the individual stockholders to vote. That was my impression. I urged them to vote, and put themselves on the record against it. They replied it was useless, as the State, county, and town vote united could carry the resolution.

(This was objected to by the plaintiff.)

Second cross-examination:

The State, county, and town vote is always united in this company when the same political party is in power in the State, county, and town.

The only exception to this was when Mr. E. J. Hale held the State's proxy. He left it to the individual stockholders to express an opinion, and then he voted with the majority.

(Objected to by defendants as irrelevant.)

D. G. MACRAE.

Sworn and subscribed before me this 9th August, 1873.

JOS. B. BATCHELOR.
Commissioner.

121 JOHN D. WILLIAMS, witness for defendants, being recalled, deposes and says:

At some time, which I think was before the contract was made with J A. Hunt & Co., though I am not certain as to the time, T. S. Lutterloh came to my office and proposed that I should go into the contract, stating, according to my recollection, that if I would go in, Mr. McKethan would do so also, and that if I would allow the use of my name, I could make ten thousand dollars without going out of my office. I declined to do so, saying that I should like to make ten thousand dollars, but could not afford to make it in that way, or out of the railroad company. The conversation was not renewed between us.

(Objected to by plaintiff.)

I do not know that I had heard of the insolvency of Hunt & Co. before the making of the contract. About the time the contract was made it was rumored around that they were not responsible, and some newspaper paragraph was read to me as to their property having been attached somewhere.

(Objected to by plaintiff.)

I have had frequent conversations with Mr. Lutterloh as to the bonds of the railroad and its difficulties. About five months since he came to my store and went into my office. He seemed not to know which side he was on. He said if the company would do right he would furnish evidence which would defeat Bayne's claim; that he was the only man who could do it. I told him, in reply, that if he would furnish evidence so that Bayne's claim could be defeated, and the company could be enabled to utilize the work which he (Lutterloh) had done under the contract, I, as one of the directors, would urge the company to pay him for his work and what it owed him. He said that would not do, as he had given Bayne his notes for some sum in connection with the
122 bonds, and must be secured against them. I told him Bayne could not collect anything on these notes of his, and the company could not do anything about them. There were two conversations, I think, on the same day. In the first he may have mentioned his notes to Bayne, but did not insist on their being arranged. He went away after my first suggestion and took time to consider it. He afterward returned, I think the same day, and then insisted on being secured against his notes to Bayne. He stated distinctly that he could furnish evidence to defeat Bayne's claim against the road.

(Objected to by plaintiff.)

The general condition of the Western Railroad Company I think is very good.

I think, if put up for sale now, it would not be allowed to be sold for less than $500,000, and could be made to pay an income on that sum. Owing to its position and complications, which would create a competition at a sale, I think it would bring more than that sum.

The title to no part of the rolling-stock which was paid for by the

company has been taken in the name of any individual, so far as I am informed.

The engine, the title to which is in myself and others, was paid for by us, and not by the road. We would not lend the road the money to pay for it on account of its complications.

Cross-examined by plaintiff:

I am president of a national bank in Fayetteville, and largely engaged in business as a merchant and in naval stores. I do not do a great deal in cotton, though I buy some. I am not president of the Cape Fear Navigation Company. B. G. Worth is president, elected at the last meeting. I was president, and declined election at the last meeting. I am secretary and treasurer. The duty of this company is to keep navigation open on the river, and for this the company
123 is allowed to charge a toll on all the boats plying on the river. I am a stockholder in the company, and interested as a stockholder in our line of boats, which owns three steamboats, &c. This tock is owned by the firm of which I am a member, to wit, Williams & Murchison. As far as I know, the line in which I am interested is doing about one-half of the business on the river. I am a member of the firm of Williams & Murchison, of Wilmington, N. C., which is doing a large business—about as large as any in Wilmington; I suppose over $700,000 or $800,000 in sales of merchandise per year. The transactions in naval stores are very large, but I cannot state the amount.

I am also connected with the commission house of Murchison & Co. of New York, which buys and sells principally cotton and naval stores on commission. The business of this house is pretty fair for a new house in New York.

In all my business connection I am quite largely interested in freights to and from Fayetteville.

I am, and have been since the stockholders' meeting at which A. J. Jones and his directory went out, a director in the Western Railroad Company. I am an original subscriber for $2,000. Sold one share, and now own $1,900.

I am one of the owners of the judgment mentioned in the pleadings, and known as the "Baldwin" judgment. Execution had been issued, and the road had been levied upon under it, and I think the marshal had fixed upon and advertised the day of sale. The committee of the board of directors appointed by the board had failed to raise the money on the credit of the road to pay off the execution. It was apprehended that the road would be sold, and would be run by the holders of the mortgage-bonds higher than the friends of the road could go for it, and would, therefore, be bought by the bondholders or some one in their interest. To prevent this, it was agreed, at a meeting of the board of directors held just before the time the sale was to have been made, that certain directors, with such other parties outside the board of
124 directors as they might be able to induce to join with them, should raise on their individual credit, or contribute of their individual means, a sum sufficient to purchase the execution; and that it should be in this way purchased and assigned to the purchasers; and that the company would pay to the purchasers interest at the rate of eight per cent. per annum on the sum advanced by them until it was repaid, and would further pay them a commission of two and a half per cent. every ninety days for the extension of the loan, making eighteen per cent. per annum on the amount due, which was the rate of interest charged by the banks at Fayetteville at that time on ordinary

business loans. The requisite sum was thereupon contributed by the following parties, to wit, myself, E. J. Lilly, A. W. Steel, A. A. McKethan, who were members of the board of directors, and Henry Lilly, who was not a director, each contributing one-fifth.

At that time A. W. Steel and E. J. Lilly were owners of the banking-house of A. W. Steel & Co., in Fayettville, and Henry Lilly was a man of means, and the brother of E. J. Lilly.

At that time the bank of which I am president and the banking-house of A. W. Steel & Co. controlled all the organized banking capital in the town of Fayetteville.

I think these two banks, by a combination, could have fixed the rate of bank interest at any sum they thought proper. There was no combination between them, and, in my opinion, none could have been made to have reduced the rate of interest to a lower sum; because in that case we could not have made the business sufficiently remunerative to obtain the capital to operate on. The capital of our bank was at that time $50,000. I don't know the capital of the other, but I think it was not more. Our deposits ranged from $50,000 up. Our bank has a board of directors.

Neither the railroad company nor the committee of the board of directors made any application to our bank or to A. W. Steel & Co. for
a loan of this money, or any part thereof, as far as I know. Jones,
125 the president of the railroad, did mention this loan to me, but it was declined, unless the individual directors would endorse the note. I don't think the board of directors gave Mr. Jones any formal authority to raise the money, because they didn't think he could do it.

Mr. McKethan was a director and stockholder in our bank. I think that a considerable amount of the stock could be sold in Fayetteville at $10 per share. I think the whole of it could be sold at that rate. The commercial value of money in Fayetteville is 1, 1¼, or 1½ per cent. per month; never less than 1 per cent. Leaving out the old debt of the company, I think that the net income of the company would have been more than $6,000 last year. The interest and commissions on the amount loaned to purchase the execution have been regularly paid, and $17,500 of the principal has also been paid, which was equally divided among the five holders of the execution. The money was raised by the sale of $500,000 of second-mortgage bonds of the Wilmington, Charlotte and Rutherford Railroad Company, with over $100,000 of coupons thereon. These bonds were turned over by Andrew J. Jones to the new directory when I became a member of the board. I don't know how long they had been held. I think they were disposed of by order of the board of directors, and the bonds had been pledged originally to the repayment of the money advanced to purchase the Baldwin judgment. I do not recollect whether the sale of these bonds and the application of the proceeds to the payment of the judgment (in part) has ever been formally reported to the board of directors, but they all know it, and it has been canvassed in the meeting of the board. I do not know whether any credit for the $17,500 has been entered on the judgment and execution. I think Henry Lilly was to attend to making the entry, and my understanding was that he was to do so. In the payment of interest and commissions the proper allowance of credit for this sum has been made.

There has never any rolling-stock been purchased and paid for by the company and the title made to individuals, including myself.

126 I never heard of any rolling-stock except the engine before mentioned, the title to which was taken by individuals.

The $17,500 is the only money that has ever been paid on the Baldwin judgment, except payments of interest and commissions.

Re-examined by defendant:

In addition to the payment of $17,500 paid for the Wilmington, Charlotte & Rutherford Railroad bonds, there was also a claim held by that road against the Western Railroad, amounting to about $21,000, which was released, and our attorneys' fees were also paid by that road.

By plaintiff:

As to the claim of the Wilmington, Charlotte and Rutherford Company against the Western Railroad Company, I do not know whether it was recognized by the latter road or not, but I thought it would have to be paid, and that judgment would be obtained on it. The Western Railroad Company was advised by its attorney that it was a valid claim, but that it could be offset*ted* with coupons of these mortgage-bonds, which was really done in the settlement.

J. D. WILLIAMS.

Sworn and subscribed before me.

JOS. B. BATCHELOR.

JOHN M. ROSE, a witness for defendant, cross-examined by plaintiff, deposes and says:

I file copies of the proceedings of the board of directors of the Western Railroad Company, at their meeting on 13th August, 1870, appointing a committee to let out the building of the road to some point on the North Carolina Railroad, and of the resolution of the committee accepting the bid of Hunt & Scales, and approving the contract with them, held on the 14th October, 1870, marked, respectively, "M, J. M. Rose," and "N, J. M. Rose."

127 I know N. E. Scales, partner of J. A. Hunt. He had once been assistant engineer of the Western Railroad Company.

I do not know what was the reputation of Hunt & Scales as railroad contractors at that time. I did not know Hunt; Scales was a young man when I knew him. They had a large contract in Alabama, and a contract on the Western North Carolina Railroad.

I think the contract with Hunt & Scales was similar to other contracts made by the road with other contractors, and quite as favorable to the road as other contracts made by it, except as to the price of the work and price to be allowed by contractor for the bonds.

I think the Western Railroad Company never required security for the faithful performance of the contract, because the work was to be paid for according to estimates of its officers, and only paid as it was done, and a part of each payment was retained or kept back as a security for compliance with the contract, and the work had before been let in small contracts. There were also forfeitures in the contracts. All these things are contained in the contract with Hunt & Scales. I understood a force was at once put on the road by Hunt; how much I do not know, as I was not at that time connected with the road. I think he continued his work until he sold out to Lutterloh. After a short interval, if not immediately, as I heard, Lutterloh went on with the work. After the new board came in, 18th January, 1871, Lutterloh gave notices to the company of his readiness to continue the work, copies of which notices are filed herewith, marked "Exhibit O, J. M. Rose." After these notices were given, the board of directors declared the contract void. Copies of the proceedings of the board of directors appointing committee to confer with Lutterloh in reference to contract, and

report of committee and action of board thereon, filed, "Exhibit P, J. M. Rose."

The books of the company do not show how much work was done by Hunt & Co. or Lutterloh on the contract.

128 I do not know who Martindale & Co. were, except from hearsay. I had heard of Sweet, who was said to be one of the firm, as a large contractor on the western extension.

I know nothing about them. L. J. Haughton's proposition was for only fifteen or twenty miles of the road.

Drane & McDowell put in a bid for the whole contract. These were experienced railroad contractors from Wilmington, Henry M. Drane and McDowell, whose other name I have forgotten. I do not know anything of the relationship of Drane and A. J. Jones, but have heard from Jones that they had been partners in railroad-contracts.

Lutterloh had been a large business operator in Fayetteville, and had had a $13,000 contract on the Western Railroad. He was then, and is now, the largest individual stockholder in the Western Railroad, and then and now owned more stock than the president and all the directors put together.

In January, 1871, L. C. Jones, president, owned five shares of stock, and the directors as follows:

J. D. Williams, twenty shares; A. W. Steel, twenty shares; E. J. Lilly, twenty-five shares; A. A. McKethan, thirty shares; M. McKinnon, five shares. These are the individual directors. The State directors were E. L. Pemberton, owning thirty shares; J. R. Lee, five shares; W. A. Guthrie, ten shares; and John Reilley, five shares. The president and directors who made the contract owned more stock than the president and directors who rescinded it.

The coupons attached to the mortgage-bonds of the Wilmington, Charlotte and Rutherford Railroad, spoken of by John D. Williams in his evidence, amounted to about $200,000.

Copy of proceedings of board of directors, February 17th, 1872, filed, marked "Exhibit Q, J. M. Rose," and copy of resolution in reference to the Baldwin judgment.

There is no other action of the board directing the sale or disposition of these bonds, and no report of such sale or disposition was made to the board by John D. Williams and others, in whose hands they were placed.

129 The suit by Baldwin on the claim for which the Baldwin judgment was rendered was brought during or before the beginning of A. J. Jones' administration. The claim against the road arose before his administration began. Jones resisted the judgment and relied on me in part to make good his defence. I attended once as a witness during his administration. I think Jones relied on me, in part, to prove that that engine was to be paid for by transportation of coal over the road from the Egypt shaft, and that the company was always ready to furnish the said transportation.

I would have sworn that when L. C. Jones returned from the purchase of the engine he reported that he had purchased an engine from Baldwin, on the representation of Mr. Derbyshire, who went with him to Baldwin, that he, Derbyshire, intended to ship one hundred tons of coal per day over the road, the freight of which was to be paid over monthly to Baldwin, until the engine was paid for. Mr. Derbyshire did commence shipping coal, and shipped enough to amount to about $300 in freight, on which I, as treasurer of the road, gave a draft on Derbyshire

to Mr. Baldwin. For some reason no other shipment of coal was made at that time.

(Objected to by defendant.)

At that time—it was immediately after the war—the company had no credit. I don't know anything of a compromise offered by Baldwin and rejected by Andrew Jones and his board of directors. The fiscal year ending March, 1873, was the most prosperous year the road has ever had. It paid no dividends to stockholders that year, but expended all its net income in the improvement of the road and property, and the payment of old debts. The paper herewith filed, marked "Exhibit R, J. M. Rose," shows all money expended for ordinary and extraordinary expenses of the road.

130 The listing of the road for taxes at the sum of $900,000 was done within the last two or three months. The time before it was listed for $750,000, I think, and has been listed at that, $750,000, ever since this board came in.

(Evidence on this point is objected to by the defendants on the ground that it is contained in written statements made to the governor and treasurer.)

I think the road and property is now worth $900,000, and that it was worth as much as it is now at the time of the adoption of the resolution, a copy of which is herewith filed, marked "Q," except that the road and property are now in a little better condition than they were then.

At the time of the adoption of that resolution I think there was another judgment of $1,000 against the road, which has since been paid in part.

The present directors take bonds from the employés of the road, but do not renew them annually. For two years back a resolution has been adopted continuing in office the employés. I, as secretary, gave bond for $3,000, I think, in 1871. The treasurer gives bond for $10,000. I don't think he has renewed his bond. The freight agent at Fayetteville gives bond for $5,000. We have lost $2,200 within the last six months. This is the only default we have ever had. I refer to losses by subordinate officers only.

Direct examination resumed:

I don't think Mr. N. E. Scales was ever present in Fayetteville before or since the making of the contract with J. A. Hunt & Co. At the time when the proposition of Mr. Lutterloh, contained in Exhibit P, was made, the company was endeavoring to require the late president, A. J. Jones, to account with the company for the proceeds of the sale of the special-tax bonds.

The work done by Hunt & Co. under the contract was during the administration of Andrew J. Jones. Mr. Lutterloh has never presented to the company an account and estimate of the work performed

131 by him under the contract. The fifteen or twenty miles bid for by L. J. Haughton is what was considered the most important part of the road, and the heaviest and most costly part of the work, except the portion within fifteen miles of Greensboro'.

Mr. Lutterloh was an original subscriber to thirty or fifty shares of the stock of the company. He purchased a good deal during and since the war; a large quantity at very reduced prices. The stock of the individual directors is all original subscriptions. I think Mr. Lutterloh transferred to the directors who came in with Andrew J. Jones all the stock they owned, or nearly so, a day or two before they qualified as

directors. The bonds of the North Caralina Railroad Company were second-mortgage bonds, and it was understood that a suit was then pending for the foreclosure of the first mortgage, which would take all the property of the mortgagor, and under this information bonds were disposed of. The annual account was made up to the 1st day of March. Since that time the assignees of the Baldwin judgment have given me their receipt for the proceeds of the Wilmington, Charlotte and Rutherford Railroad bonds, and the company has credit by the amount. I don't know whether there has been an entry of the credit made on the judgment or not. The matter of the disposal of the Wilmington, Charlotte and Rutherford Railroad bonds was referred to Major McRae, attorney of the company, by the board of directors, after the bonds had been placed in the hands of Mr. Williams and others, as by Exhibit Q, the assignees, except Mr. Steel and Henry Lilly, being present at the meeting and assenting, and subsequently the attorney reported to the board of directors the disposition he had made of the bonds, and his report was approved by the board, but no minute was made of it.

Mr. L. C. Jones bought the engine from Baldwin & Co., and made the contract, and knows all about it. About $6,000 of the debt was for other articles than the engine, and as to these we had no defence; our defence only related to the engine.

132 The earnings of the company for the present fiscal year, as compared with the earnings of the past fiscal year, are increasing. I think the road is managed very judiciously and economically.

The bond of the defaulting freight agent was $3,000, given in 1871. All of it was collected. The loss was the excess of the defalcation over the bond.

Cross-examination resumed:

The Wilmington, Charlotte & Rutherford Railroad bonds were given to the State as first-mortgage bonds. The State afterwards released its first mortgage, by act of assembly, and took a second mortgage to secure these bonds, and allowed the company to execute a first mortgage to other parties to secure other bonds. These bonds were assigned to the Western Railroad Company by the State after it had released the first mortgage and accepted the second.

JOHN M. ROSE.

Sworn and subscribed before me.

JOS. B. BATCHELOR,
Commissioner.

L. C. JONES, a witness for the defendant, cross-examined by plaintiff, deposes and says:

I have always understood that the firm of J. A. Hunt & Co. was composed of J. A. Hunt and Nath'l E. Scales. I had known N. E. Scales for two years before the contract was given to Hunt & Co.; he was a gentleman of education and character, and had been, before the war, assistant engineer of the Western Railroad Company. Hunt & Co. had the reputation of being experienced railroad contractors. With the exception that the price charged for the work was much above the engineer's estimates, the contract with Hunt & Co. was the same in its terms and conditions—was the same as other contracts made by the company for the construction of the road.

133 I do not know whether or not it has been customary with North Carolina railroads to require bond and security of contractors for the performance of their contracts. I can't answer, for the want of knowledge on the subject. The work, if it had been completed

under the contract with Hunt & Co., would have exceeded in price the engineer's estimates by at least $80,000. I was a member of the committee to make contracts for building the road, but I had nothing to do with making the contract. I was called before the board of directors about the time it was concluded to give the contract to Hunt & Co., to make the calculation as to the difference between the price of the work in cash and in bonds at sixty cents on the dollar.

At this or a previous meeting of the directors the bids of Drane & McDowell, Martindale & Co., L. J. Haughton, and Hunt & Co. were all spoken of and discussed by a full meeting of the board. A. J. Jones said that he had been a partner with Drane in former contracts, and if the contract was given to him it would be said that he (A. J. Jones) was interested in it. The bid of Martindale & Co. was the lowest; that he objected to giving it to them because they were "carpet-baggers," and it would create opposition; Haughton's bid nearly coincided with the engineer's estimates, but he did not think Haughton was prepared to do the work at the prices, and Haughton's bid was only for about fourteen miles of the work—to Ore Hill. He said that Hunt & Co. had been large contractors on the Western North Carolina Railroad, had done much work there, were responsible men, and he was willing to give the contract to them; that they had facilities, such as mules, carts, utensils, &c., and were ready to commence the work at once. He said that N. E. Scales had been assistant engineer on the road, and was a good and responsible man, and a friend of mine. I assented to his statement as to the character of Mr. Scales.

I went to the office of the company with A. J. Jones, and there met the committee for making the contracts. I went as the engineer
134 of the company, to give the committee any assistance which might be necessary from me, as engineer of the company, being told by A. J. Jones that the contract with Hunt & Co. would be closed that day. After I got to the office A. J. Jones asked me if I could find a copy of the specifications usually attached to contracts. I went to the office of the company and found the printed copy of specifications which is attached to the contract and referred to in and made part of it. An error was discovered in the bid of Hunt & Co. in the item of indurated clay, for which fifty-six cents was charged instead of thirty-one, as in the original bid. On attention being called to this it was corrected, and the figures altered to thirty-one. I do not recollect that Hunt insisted that this was the original bid, with list of prices for which he would do the work, and that I said it was too much, and that A. J. Jones said he would not sign the contract unless it was altered to what I said was right. I think this paper attached to the contract is not the original bid, but may be a copy of it. If the original bid is in the office I do not know of it. This is not the original paper which Hunt submitted, and on which the board of directors decided to give Hunt the contract, but may be a copy of it. I had a general knowledge of the contract, and refused to sign it as a member of the contracting committee. I do not know what deliberation the other members of the committee gave to it. I refused to sign it because the prices were higher than I, as engineer, had estimated that the work ought to cost, and it was customary with railroads to let out the work at not above engineer's estimates. I wrote the word "witness" on the left side of the paper, and wrote my name under it as a witness to the signing of the contract by the other parties. My name does appear on the fourth line of signatures, but I signed as witness, and in a different place, not being in the same column with the committee.

The firm of Martindale & Co. was composed of J. A. Martindale, Sweet, and J. A. Byrnes, and others whose names I do not know. I do not know of any person having vouched for them as gentlemen of
135 character and responsibility. The bid of Drane & McDowell was higher than the bid of Hunt & Co.

Hunt & Co. commenced work on the road. They did about $3,000 worth (not more) before the assignment of the contract to T. S. Lutterloh. They worked about two months with a small force. The work was not examined by me for the purpose of making an estimate so that the contractor could get pay for the work. On two occasions Mr. Jones handed me about six or eight hundred dollars to hand to Hunt to pay his hands, which I did. The work had been previously staked out by me. I did not examine the work, because I was never called on. I was never directed to do so. I did not consider the work as fairly commenced. Mr. Hunt was absent a great deal of the time, leaving Mr. Harman in charge. I saw Mr. Hunt only twice during the time. He promised frequently to bring his teams down and begin the work regularly, but he never did so. At the commencement of the work I called Harman's attention to the fact that the clearing, instead of being forty feet on each side from the centre line of the road, was not forty feet wide in all, and that this in itself was a violation of the contract. I asked why the clearing was made so, and he said Mr. Hunt had so directed. I never reported this to the board, as before a meeting of the board was had the contract had been assigned to Lutterloh. I have never seen any work done by Mr. Lutterloh on the road under the contract.

I have seen a communication from Mr. Lutterloh, as contractor, to the president, board of directors, and to myself, as engineer of the Western Railroad Company, stating that he had done the work laid off, and asking that more be staked off for him to do.

(Objected to by defendant.)

Of my knowledge, no work was staked off for Mr. Lutterloh. Mr. Lutterloh has commenced suit against the company for a breach of the contract, in the superior court of Cumberland County. I bought
136 an engine called the Chatham, for the Western Railroad Company, from M. W. Baldwin & Co., about March, 1866, at the price of about $16,000. It was bought on my representations that from information received from Mr. Derbyshire, the owner of the Egypt coal mine, that said mine was about to commence work, and that we needed the engine for the transportation of coal, and that we would be enabled from the receipts from the transportation of coal to pay for the engine probably within the year, if the transportation of coal was as great as Mr. Derbyshire promised it should be. I afterwards went to Philadelphia in person, M. W. Baldwin & Co. having in the mean time seen Mr. Derbyshire, and on that visit they consented to let the Western Railroad Company have the engine on the terms proposed. I did not understand that the contract was that the engine was to be paid for by the freight on coal transported by Mr. Derbyshire only; but it was expected that the freight on the coal to be transported by Mr. Derbyshire would in the year amount to more than enough to pay for the engine, and I did expect that the engine would be paid for by receipts for the transportation of coal; but I did not expect that the engine would not be paid for unless the coal-freight receipts amounted to enough to pay for it.

Q. Didn't Derbyshire go with you to Baldwin when the contract for the purchase of the engine was concluded?

A. I don't think he was present at the time the contract was concluded. I think, however, that he went with me to the office of Baldwin & Co. during my visit to Philadelphia, before the contract was concluded.

Q. Had not Baldwin declined or refused to let the Western Railroad Company have the engine upon the credit of the company, and before he had had communications with Derbyshire on the subject of transporting coal over the Western Railroad?

A. I don't think it was a positive refusal to let the Western Railroad Company have the locomotive. They (Baldwin & Co.) wanted other assurance that that amount of coal would be transported.

137 Q. Would Baldwin & Co. let the engine go to the Western Railroad Company until they received the assurance of Derbyshire that he would transport large quantities of coal over the road?

A. They did not let the engine go to the Western Railroad Company until they received the assurance of Derbyshire that the amount of coal would be transported over the road that I had represented.

Q. Was it the chief reason why the railroad wanted this engine that Derbyshire had agreed to transport large quantities of coal over the road?

A. He had stated that he expected to transport large quantities of coal over the road that year, and we bought the engine for that reason.

Q. Was not the contract that the coal freights of Derbyshire should be paid exclusively to Baldwin by drafts on Derbyshire in favor of Baldwin & Co.?

A. I think it was.

Q. Was not that the consideration upon which Baldwin consented to let your railroad company have the engine?

A. I think it was

Q. Did Baldwin & Co. not say that the coal freights of Derbyshire—they knowing Derbyshire to be a man of large means—was to be considered as pledged to them until their engine was fully paid for, and did not both you and Derbyshire assent thereto?

A. I think I agreed to that, and the drafts were made on Derbyshire for the amounts due from him.

Q. Was not the purchase of the engine for the accommodation of Derbyshire as well as of the road, and so agreed to be by you, Baldwin, and Derbyshire?

A. Mr. Derbyshire had no agreement in the matter at all, except to pay over drafts for amounts due us from him for transportation of coal to Baldwin & Co. The agreement of Baldwin & Co. was that it was bought for general work on the road, but more especially for transportation of coal from the Egypt mine, of which Derbyshire was president.

138 Q. Was it not a part of the contract of purchase that Baldwin was to receive pay for his engine from your coal freights against Derbyshire, which were to be exclusively applied to such payment?

A. All the receipts for coal transportation were to be paid to Baldwin, as far as they went, until the engine was paid for.

Q. Did not Baldwin rely upon Derbyshire for supplying freights, and thereby paying for the engine, rather than upon the credit of the Western Railroad Company?

(Objected to by defendant.)

A. I presume that he relied upon the statement of Mr. Derbyshire that he expected to ship a certain amount of freight, rather than on the credit of the company.

Q. Was not the railroad company prepared and always ready to transport one hundred tons per day of coal for Derbyshire, the proceeds of the amount shipped to be paid to Baldwin for his engine?

A. The road was prepared to ship from seventy-five to one hundred tons of coal per day at the time the engine was received, and for a year afterwards.

Q. Did not Derbyshire fail to furnish such coal, and was not that the only reason why Baldwin was not paid for his engine?

A. The stoppage of the shipment of coal from the Egypt mine was the reason why Baldwin & Co. were not paid for their engine sooner. We lacked the revenue we expected to receive from the shipment of coal. If we had had funds from any other source we would have paid for it—that is, if I had had control. I was only superintendent at the time.

Direct examination resumed by defendant:

Mr. N. E. Scales never appeared personally in the contract, from beginning to the end of it.

I wrote letters to him in Alabama, and received replies from him from there during that time; and Mr. Hunt told me that Mr. Scales would take charge of the work in Alabama, and he (Hunt) would take charge of the work here.

139 (Objected to by plaintiff.)

I think I know the general reputation of Hunt & Scales as to solvency in Fayetteville when they took the contract; it was that they were insolvent.

It is not usual to allow contractors with railroad companies to construct the road the privilege of assigning their contracts without the consent of the company. It is not usual to place all the available funds of the company in the hands of the contractor before the work is done, thereby preventing the engineer from making estimates of the work done, and deciding what amount should be paid monthly for the work done on engineer's estimates.

I told Mr. Jones, before the contract was made, that the prices were too high, and I refused to sign the contract with Hunt & Co., because it was above the engineer's estimates, and protested against it at the prices at which it was made. Hunt & Co. proposed to take the bonds of the company at sixty cents in the dollar; Martindale & Co. proposed to take them at seventy cents in the dollar, making a difference of ninety thousand dollars between the two bids. The bid of Martindale & Co. was in writing.

(Objected to by plaintiff, because fact stated is in writing.)

Hunt & Co. did not bring any mules and carts to the Western Railroad to do the work with; he did his work with wheelbarrows which he brought from Wilmington. The larger portion of them was new, the balance were old.

My recollection of the contract with Baldwin & Co. is this: They sold the company the engine for $16,000. As an inducement for them to sell the company the engine, it was agreed that all the freight received for coal shipped from the Egypt mine should be paid to Baldwin & Co. for the engine, until it was paid for, either by drafts on Mr. Derbyshire, or as soon as received from him by the company. Mr. Derbyshire stated to Baldwin & Co. that he would ship a large amount of coal from the mine—at least sixty tons a day, and it might go as high

140 as one hundred tons. Nothing was said between me and Baldwin & Co. as to how the engine was to be paid for if there was

A. I don't think he was present at the time the contract was concluded. I think, however, that he went with me to the office of Baldwin & Co. during my visit to Philadelphia, before the contract was concluded.

Q. Had not Baldwin declined or refused to let the Western Railroad Company have the engine upon the credit of the company, and before he had had communications with Derbyshire on the subject of transporting coal over the Western Railroad?

A. I don't think it was a positive refusal to let the Western Railroad Company have the locomotive. They (Baldwin & Co.) wanted other assurance that that amount of coal would be transported.

137 Q. Would Baldwin & Co. let the engine go to the Western Railroad Company until they received the assurance of Derbyshire that he would transport large quantities of coal over the road?

A. They did not let the engine go to the Western Railroad Company until they received the assurance of Derbyshire that the amount of coal would be transported over the road that I had represented.

Q. Was it the chief reason why the railroad wanted this engine that Derbyshire had agreed to transport large quantities of coal over the road?

A. He had stated that he expected to transport large quantities of coal over the road that year, and we bought the engine for that reason.

Q. Was not the contract that the coal freights of Derbyshire should be paid exclusively to Baldwin by drafts on Derbyshire in favor of Baldwin & Co.?

A. I think it was.

Q. Was not that the consideration upon which Baldwin consented to let your railroad company have the engine?

A. I think it was

Q. Did Baldwin & Co. not say that the coal freights of Derbyshire—they knowing Derbyshire to be a man of large means—was to be considered as pledged to them until their engine was fully paid for, and did not both you and Derbyshire assent thereto?

A. I think I agreed to that, and the drafts were made on Derbyshire for the amounts due from him.

Q. Was not the purchase of the engine for the accommodation of Derbyshire as well as of the road, and so agreed to be by you, Baldwin, and Derbyshire?

A. Mr. Derbyshire had no agreement in the matter at all, except to pay over drafts for amounts due us from him for transportation of coal to Baldwin & Co. The agreement of Baldwin & Co. was that it was bought for general work on the road, but more especially for transportation of coal from the Egypt mine, of which Derbyshire was president.

138 Q. Was it not a part of the contract of purchase that Baldwin was to receive pay for his engine from your coal freights against Derbyshire, which were to be exclusively applied to such payment?

A. All the receipts for coal transportation were to be paid to Baldwin, as far as they went, until the engine was paid for.

Q. Did not Baldwin rely upon Derbyshire for supplying freights, and thereby paying for the engine, rather than upon the credit of the Western Railroad Company?

(Objected to by defendant.)

A. I presume that he relied upon the statement of Mr. Derbyshire that he expected to ship a certain amount of freight, rather than on the credit of the company.

Q. Was not the railroad company prepared and always ready to transport one hundred tons per day of coal for Derbyshire, the proceeds of the amount shipped to be paid to Baldwin for his engine?

A. The road was prepared to ship from seventy-five to one hundred tons of coal per day at the time the engine was received, and for a year afterwards.

Q. Did not Derbyshire fail to furnish such coal, and was not that the only reason why Baldwin was not paid for his engine?

A. The stoppage of the shipment of coal from the Egypt mine was the reason why Baldwin & Co. were not paid for their engine sooner. We lacked the revenue we expected to receive from the shipment of coal. If we had had funds from any other source we would have paid for it—that is, if I had had control. I was only superintendent at the time.

Direct examination resumed by defendant:

Mr. N. E. Scales never appeared personally in the contract, from beginning to the end of it.

I wrote letters to him in Alabama, and received replies from him from there during that time; and Mr. Hunt told me that Mr. Scales would take charge of the work in Alabama, and he (Hunt) would take charge of the work here.

139 (Objected to by plaintiff.)

I think I know the general reputation of Hunt & Scales as to solvency in Fayetteville when they took the contract; it was that they were insolvent.

It is not usual to allow contractors with railroad companies to construct the road the privilege of assigning their contracts without the consent of the company. It is not usual to place all the available funds of the company in the hands of the contractor before the work is done, thereby preventing the engineer from making estimates of the work done, and deciding what amount should be paid monthly for the work done on engineer's estimates.

I told Mr. Jones, before the contract was made, that the prices were too high, and I refused to sign the contract with Hunt & Co., because it was above the engineer's estimates, and protested against it at the prices at which it was made. Hunt & Co. proposed to take the bonds of the company at sixty cents in the dollar; Martindale & Co. proposed to take them at seventy cents in the dollar, making a difference of ninety thousand dollars between the two bids. The bid of Martindale & Co. was in writing.

(Objected to by plaintiff, because fact stated is in writing.)

Hunt & Co. did not bring any mules and carts to the Western Railroad to do the work with; he did his work with wheelbarrows which he brought from Wilmington. The larger portion of them was new, the balance were old.

My recollection of the contract with Baldwin & Co. is this: They sold the company the engine for $16,000. As an inducement for them to sell the company the engine, it was agreed that all the freight received for coal shipped from the Egypt mine should be paid to Baldwin & Co. for the engine, until it was paid for, either by drafts on Mr. Derbyshire, or as soon as received from him by the company. Mr. Derbyshire stated to Baldwin & Co. that he would ship a large amount of coal from the mine—at least sixty tons a day, and it might go as high

140 as one hundred tons. Nothing was said between me and Baldwin & Co. as to how the engine was to be paid for if there was

any failure in shipping coal from the mine. I told him I thought the company could pay for it in one year by the freights on coal from the Egypt mine.

After I became president I submitted the whole matter to its attorney, and he advised me that the company had no good defence to the action, and that Baldwin & Co. would recover.

(Objected to by plaintiff.)

Cross-examination by plaintiff:

I heard John M. Rose and A. A. McKethan, and others whose names I can't recall—it was street talk—say that Hunt & Co. were insolvent, and that this was their general character. The report of insolvency proceeded from those who were opposed to letting Hunt & Co. have the contract; they said Hunt & Co. were insolvent, and the road would not be built. I think the statement of Jno. M. Rose, that he had seen a statement in a newspaper that their property was attached, gave rise to inquiry as to their solvency; and I think it possible the attention of the public may have been called to the matter by the statement of Mr. Rose. I heard no reason assigned for the belief that Hunt & Co. were insolvent, except by Rose and McKethan, and they gave as their reason that their (H. & Co.'s) property had been attached in Morganton.

L. C. JONES.

Sworn and subscribed before me.

JOS. B. BATCHELOR,
Commissione.

The defendant offered as evidence in this cause the depositions taken in the case of M. Baird, surviving partner of M. W. Baldwin & Co., against the Western Railroad Company, on file in the clerk's office of the United States circuit court, with the record of the suit.

(Depositions objected to by plaintiff.)

141 The defendant also offered as evidence the acts of assembly in regard to the mortgage-bonds of the Wilmington, Charlotte and Rutherford Railroad Company.

TOD R. CALDWELL, a witness for the defendants, being duly sworn, deposes and says:

J. A. Hunt and N. E. Scales composed the firm of J. A. Hunt & Co., as was generally understood. About the year 1870, or latter part of 1869, I had various claims against J. A. Hunt & Co., and my recollection is that I collected them all without suit. One of them, the last I had to collect, amounted to twelve or fifteen hundred dollars, and I don't recollect whether or not I brought suit on this claim, but it was paid. The claims were given me to collect as attorney. On the presentation of the last claim to Mr. Hunt, he stated that the firm was broke, and the general reputation of the firm in the community was that it was insolvent. My impression is that they did finish their contract on the western extension. They were reported insolvent just before they went to Alabama.

Cross-examination:

Hunt was regarded as an experienced and reliable railroad contractor; he was for a long time engaged on the western extension, and was regarded as one of the best contractors on the road. When I was president of the road we awarded a contract to Hunt, although he was

underbid by another person, because it was believed that he would do the work faithfully, and within the time specified in the contract.

TOD R. CALDWELL.

Sworn and subscribed before me.

JOS. B. BATCHELOR,
Commissioner.

Defendant offers to prove that the Wilmington, Charlotte and Rutherford Railroad was sold, under a decree of the superior court of
142 New Hanover County, for $1,165,000, which was less than the amount of mortgage-bonds for which it was sold.

The plaintiff admits that the said railroad sold for said sum, and that the amount of bonds will appear from the mortgage and the proceedings in the action under which it was sold.

WILLIAM J. HAWKINS, a witness introduced on behalf of the plaintiff, being duly sworn, says:

My name is William J. Hawkins. I am president of two railroads in this State. I have been connected with railroads for fifteen or eighteen years, nearly all the time as president. The Raleigh and Augusta Air Line Railroad has been built under my administration. I have no connection with any of the parties to this suit.

In most railroad contracts there is a provision authorizing the engineer of the railroad to increase the number of hands of the contractor when he does not think the number of hands at work is sufficient to finish the work in the time specified. This provision does not appear in the contract just read me, between J. A. Hunt & Co. and the Western Railroad Company, but, with this exception, I think the contract and specifications are in the usual form. There is usully given by the contractors a bond of from 5 to 10 per cent., conditioned for the commencement of the work in the time specified, which bond is discharged on the work's being begun in the proper time. In giving out railroad contracts we do not look to the solvency of the contractor, but if we find that he is an old and experienced, and has the means to begin the work, and can command the labor, we don't look to see whether or not he is backed by other parties or is himself solvent. In giving out railroad contracts we do not look only to the fact that a man is the lowest bidder, but if we find that another party, who may bid higher, is a better contractor and more likely to do the work, and the higher bid is a reasonable one, and acceptable to the company, we accept the higher bid. I never
143 heard of the firm of Martindale & Co. as railroad contractors. I do, however, know Martindale and Sweet as members of the legislature, and Byrnes as secretary of the senate. From my knowledge of these parties I don't think that prudent railroad managers would have awarded them a large contract, no matter how small their bid. I don't know the condition of the Western Railroad, not having travelled over it recently.

I think the value of the road and its equipment, if taken up and sold, would be as follows: Say, 43 miles of iron, at $45 per ton, $146,000; iron estimated at 48 pounds to the yard; chairs and spikes at $200 per mile, $8,600. Estimate for cars, locomotives, stationary engine, and tools is based on the report of M. Atkinson, the master mechanic; I fix the value of these at $42,500, judging from the report alone. Handcars, pumps, scales, and road tools, at $2,900. I do not estimate the

cross ties at anything for sale. I have no knowledge of the real estate, including depots and depot-houses. This estimate is based on the price of first-class old rails, to be reworked.

Q. Take the Western Railroad Company as it is, without reference to the cost of construction or the value of its materials, to be run as a distinct road, as at present, what would it sell for in cash?

A. Basing my estimate upon the previous reports of the company, I would say that $125,000 was a full estimate for it. If it will only earn a sufficient sum to keep itself in good condition and pay a surplus of $10,000 per year, I would not say it was a first-rate security for that sum—that is, $125,000. I do not see who would desire to own it, unless with a view to extending it or running it in connection with some connecting road.

I think if the company had no other means besides the $900,000 of mortgage-bonds of extending the road to Greensboro', a distance of fifty-four miles, and with a prospect of stopping in the woods, the bonds would not be worth fifty cents in the dollar.

144 I have examined the list of prices affixed to the contract with Hunt & Co. My opinion is that for excavations of ordinary ground, when the dirt taken out could not be used for fills, a fair price is twenty cents per cubic yard; when the dirt taken out can be used for fills, and to be hauled not over eight hundred feet, I think a fair price is fifteen cents each per cubic yard, for both cuts, or excavations and fills. When fills are to be made with dirt not taken from excavations, I think twenty cents per cubic yard a fair price. I do not understand what is meant by "indurated clay," and cannot, therefore, say whether the price is too much or too little. The rock excavation I consider from fifty to seventy-five cents a cubic yard too much—from one dollar and twenty-five cents to one dollar and fifty cents per cubic yard being a fair price for that. I consider the price of masonry in arches from five to six dollars per cubic yard too much. Abutment walls for arches two dollars per cubic yard too much. I would consider eight dollars per cubic yard a fair price. I consider forty cents per cubic yard a fair price for "hard pan." The prices for other items mentioned in the list are fair and reasonable.

All these estimates are made by me as the cash prices for the work, &c.

If the work, &c., was to be paid for in bonds, at sixty cents in the dollar, I think the prices charged in list marked "A," with contract, are not too high.

If paid for in bonds at par, I think the prices charged in list "B," with contract, are not too high.

I think an engine such as that described to me by the president, L. C. Jones, and said to be purchased by J. D. Williams and others, and now rented to the Western Railroad Company, is worth, for rent, $150 per month, provided the company has the right to return it to the owners at any time it may think proper to do so.

I think the Western Railroad Company, if it was unincumbered and out of debt, with privilege of mortgaging, extending, connecting with other roads, &c., would be worth about $125,000 as a railroad investment; and I do not think it would bring more than that if brought to sale for cash. I do not think it worth that much to any other railroad interest, except the Raleigh and Augusta Air Line.

145 Article 7 of the contract is a very important part of the contract, and if stricken out, it would not be an ordinary or usual contract. I do not think article 12, in the altered or amended contract

with T. S. Lutterloh, dated 5th January, 1871, is a usual or customary part of such contracts. I should consider it a most unusual way of doing business, and, as far as my knowledge goes, unprecedented.

In my estimate of the value of the Western Railroad Company, I have not taken into consideration any future connection or probable increase of business, but have taken it as it is now worked, and as an individual investment. If consolidated with some other road I think the value would be increased. If consolidated with the Raleigh and Augusta Air Line Railroad Company, I think it would be greatly increased in value.

W. J. HAWKINS.

Sworn to and subscribed to before me.

JOS. B. BATCHELOR,
Commissioner.

JOHN C. WINDER, a witness introduced on behalf of defendant, being duly sworn, says:

I am a civil engineer by profession, and have been engaged since the war on the Wilmington and Weldon Railroad, Wilmington and Columbia Railroad, Wilson and Tar River Railroad, and Carolina Central Railroad. I have had considerable experience in the construction of railroads in different States. I have been engaged in civil engineering since 1850.

I have examined the parts of the contract with J. A. Hunt & Co., and the specifications and bid, with list of prices attached thereto, with reference to excavations and embankments, and my opinion is that according to these the contractor would be entitled to pay for both excavations and embankments, notwithstanding the dirt taken from the excavations was used in making the embankments.

146 I have examined the list of prices marked "A," with the contract; my opinion is that they are unusually high. It is not usual to let out contracts at prices above engineer's estimates, but sometimes it is done, where there are no bids as low as those estimates, and the work has to be completed.

There is generally a clause in contracts of this kind prohibiting the contractor from assigning his contract or subletting without the consent of the railroad company; it would be an omission in the contract of a usual and important clause to leave it out.

Q. You have read article twelve in the original contract with Hunt & Co., and the article substituted therefor and numbered twelve in the modified contract with T. S Lutterloh. State whether the contract, as there modified, is usual and safe for the company, in the absence of any security on the part of the contractor for the performance of the contract.

A. I should regard it as unusual and unsafe, ordinarily.

(Question and answer objected to by plaintiff.)

I was present at the sale of the Wilmington, Charlotte and Rutherford Railroad, under a decree of the superior court of New Hanover County. I don't remember the amount at which it was bought—I think, about $1,100,000. It was sold at public auction at the court-house door by the commissioners, there being quite a crowd present.

Cross-examination:

The contract and the specifications generally are in the usual form, with the usual stipulations of such contracts. I refer to the original contract with Hunt & Co. I don't include the prices. The clause in

the specifications, in relation to excavations and embankments, that the contractor shall be entitled to pay for both excavations and embankments, notwithstanding the dirt taken from the excavations is used in making embankments, is a usual specification in such contracts.

147 I have never known an instance where any security other than the reservation was taken from the contractor for the performance of the contract.

Railroad companies usually look to the ability of the contractor to complete the contract within the time specified. Taking all things into consideration, they choose the lowest bidder who they think will perform the contract; and where a man has been for a long time a contractor, and has always completed his contracts, it would be a very strong recommendation of him as a fit person to whom the contract should be awarded, provided always his was the lowest bid. When I speak of the prices in the paper marked "A" as being too high, I mean if the pay was to be clean cash; if the pay was to be in bonds, I can give no opinion as to whether or not they are too high, as I know nothing of the value of the bonds.

Re-examination direct:

If a bidder for a contract had broken himself by railroad contracts, I would regard him as an unsafe man to whom to award a contract.

When two persons are bidding for a contract, the bid of one being above and the other within engineer's estimates, with a difference of $80,000 in their bids, the contract should be awarded to the lowest bidder, if the company was satisfied that he would carry out the contract.

JNO. C. WINDER.

Sworn and subscribed before me.

JOS. B. BATCHELOR,
Commissioner.

A. B. ANDREWS, a witness for the plaintiff, being duly sworn, says:

I am superintendent of the Raleigh and Gaston Railroad, and have been for six years, and have been superintendent of the Raleigh and Augusta Air-Line (formerly Chatham) Railroad about three or

148 four years. The Raleigh and Augusta Air-Line Railroad connects with the Western Railroad at Sandford, thirty-eight miles from Fayetteville. The Western Railroad has no outlet by rail, except the Raleigh and Augusta Air-Line Railroad.

I have no knowledge of the local business of the Western Railroad except from the reports of its officers. As to its through business, I get some information from its connection with the Raleigh and Augusta Air-Line Railroad Company.

The condition of the road is fair. Their rolling-stock, I think, is limited, but it is in good condition.

Taking the Western Railroad as it stands, and let it be unincumbered and free of debt, and with all its possibilities of extension and connections, I think, if put up for sale now, it would not be worth more than one hundred and twenty-five or one hundred and thirty thousand dollars.

I should say the equipment of the road, including iron, chairs, and spikes, rolling-stock, tools, pumps, scales, and all articles estimated by Dr. Hawkins in his evidence, is worth about $211,000, if taken up and sold. I do not include road-bed or any real estate in this valuation.

A. B. ANDREWS.

Sworn and subscribed before me.

JOS. B. BATCHELOR.
Commissioner.

JAMES DOUGHERTY, jr., a witness for the defendant, being duly sworn, says:

Q. What is your name?

Ans. James Dougherty, jr. I am connected with the printing-office of the Journal of Commerce newspaper and have been for about four years. The paper herewith produced and filed, marked "Exhibit A," was published in the Journal of Commerce newspaper on the 28th day of February, the 1st day of March, and the 2d day of March, 1871, in all the issues of those dates.

Q. Is the Journal of Co merce a newspaper of large circulation in New York?

149 A. It is, and particularly among banking and commercial classes.

JAMES DOUGHERTY, JR.

T. A. WHITAKERS, a witness for the defendant, being duly sworn, says:

My name is Thomas A. Whitakers. I am connected with the World, a newspaper published in the city of New York, and have been so connected since the month of July, 1861. The paper herewith, produced and marked "Exhibit A," is a copy of a notice printed and published in the aforesaid World newspaper Tuesday, February 28, 1871, and I think the two following days. The World is a newspaper of large circulation in the city of New York and throughout the country.

T. A. WHITAKERS.

HENRY W. HOWELL, a witness for the plaintiff, being duly sworn, says:

1. Are you the complainant in this action?

A. I am.

2. What is your age, occupation, and business?

A. I am over fifty years of age; am a broker, and reside in Elizabeth, N. J.

3. Do you or do you not own any of the mortgage-bonds of the Western Railroad Company in North Carolina? If yea, how many, of what amounts, and what their numbers?

A. I own five bonds of said railroad company, of $1,000 each, Nos. 36, 37, 38, 39, and 40.

4. From whom did you get said bonds, what did you give for them, and at what time did you get them?

A. I bought the bonds from Henry J. Rogers. I gave seventy-five per cent. I bought them in December, 1870, about the 23d day of said month.

5. State whether or not, at or before you got said bonds, as above stated, you knew or had heard, or had reason to suspect, that said bonds had been fraudulently issued, or that the mortgage for the securing of the same had been fraudulently made.

150 A. I did not know, had no reason to suspect, and had not heard, either at the time or before I got said bonds, that they had been fraudulently issued, or that the mortgage for the securing the same had been fraudulently made.

6. In whose possession did you place said bonds, and for what purpose?

A. I placed the bonds in the possession of Col. T. C. Fuller for collection.

7. If you know anything else that would be beneficial to either complainant or defendant in this suit, please state it.

A. I know nothing else.

H. W. HOWELL.

Cross-examination:

1. Are you acquainted with the handwriting of L. P. Bayne and Henry J. Rogers?

A. I am.

2. Is the paper-writing herewith filed, marked "A," in the hand of Mr. Rogers?

A. It is.

3. In whose handwriting is the name of the subscribing witness to the paper produced and herewith filed, marked "Exhibit B?"

A. It is in the handwriting of L. P. Bayne.

4. Who composed the firm of L. P. Bayne & Co. in the year 1870?

A. Lawrence P. Bayne and Henry J. Rogers.

5. Have you had any connection with the firm of L. P. Bayne & Co.?

A. I have done a good deal of business through them. They have acted as my bankers. My business place is No. 67 Beaver street, N. Y.

6. In December, 1870, and since that time, were you frequently in the office of L. P. Bayne & Co.?

A. I was very frequently there.

7. Will you state the conversation which took place between yourself and Henry J. Rogers at the time when you bought the bonds?

151 A. I cannot. I made no enquiries with regard to the bonds. Mr. Rogers and I had had many operations together. The transactions took place in the office of L. P. Bayne & Co., according to my best impression.

8. How did you pay for these bonds?

A. Mr. Rogers and myself had many operations together, and in the settlement of our business I took these bonds at the figures above mentioned.

9. Have you ever paid for them?

A. I have; the sale was unconditional.

10. What was done with the bonds at the time of the sale?

A. I do not remember whether or not I took the bonds in my possession at the time. The bonds were enclosed in an envelope endorsed by me and in my name, and subject to my order. My impression is I had the bonds in my possession before May, 1871.

11. Did you have any transaction with regard to any other bonds of the Western Railroad Company? If yea, what?

A. I have had none.

12. Did you ever see any other bond of the Western Railroad Company?

A. I have. I saw them at the office of L. P. Bayne & Co. I saw a package of the bonds, said to contain 435 bonds of the denomination of $1,000 each.

13. Do you know where the bonds (the 425 bonds) are now?

A. They are in the vault of the Stock Exchange; they are there deposited in my name, as trustee.

14. As trustee for whom?

A. I must refer to my receipts to answer that question.

15. When were the bonds deposited with you as trustee?

A. My impression is they were deposited with me during the winter of 1872 and 1873.

16. Was any instrument of writing drawn up with regard to the trust?

A. I think there was. If there was it was deposited with the other papers.

152 17. Where did the transaction take place?

A. In the office of L. P. Bayne & Co. The transfer was made to me by the party for whom I hold the bonds as trustee. I was in the office of L. P. Bayne & Co., and was requested to accept the trust by Mr. Bayne or Col. Fuller, or the other party, whose name I do not remember. I have no personal interest in the matter.

18. What were the terms of the trust?

A. I do not remember. As regards the tenth answer, I considered the bonds in my possession as soon as the operation was made. I probably left them there for safe-keeping, subject to my order. I refer here to the five bonds which I own.

19. Did Mr. Rogers or Mr. Bayne advise you to bring the suit against the Western Railroad Company and others?

A. I do not remember. I saw a copy of the mortgage in the office of L. P. Bayne & Co., I believe.

H. W. HOWELL.

On Tuesday, August 19th, H. W. Howell, being recalled, at his own request, deposes and says:

I thought that I had a paper-writing transferring to me the 425 bonds as trustee, but, on examination, I ascertain that I have no such paper-writing, and I presume I gave a receipt to hold these bonds, subject to the result of certain litigations in reference thereto. I hold the bonds, I think, merely at the request of L. P. Bayne & Co. and Col. T. C. Fuller. I have no interest in them. I am a stake-holder merely. I received them from L. P. Bayne & Co. I cannot tell to whom the receipt was made or who holds it.

1. Have you had any consultation with any member of the firm of L. P. Bayne & Co. since your examination yesterday, or have you visited their office since that time?

A. I have had no consultation with any member of the firm of L. P. Bayne & Co. I have visited their office for purposes foreign to this.

153 Q. Did you speak of this matter at all at their office?

A. I did; simply to say I was to meet these gentlemen at eleven o'clock to close my examination.

3. Can you not remember the name of the other party who you supposed was interested in the 425 bonds besides L. P. Bayne & Co.?

A. I think I was in error. There is no other party, I think, except L. P. Bayne & Co.

H. W. HOWELL.

Paper A, J. M. Rose.

FAYETTEVILLE, *Aug.* 13, 1870.

At a meeting of the board of directors, held this day—present, A. J. Jones, president, and W. B. Richardson, T. S. Lutterloh, D. J. Underwood, J. W. Hopkins, J. A. McDonald, Jas. S. Harrington, directors—

Resolved, That the president of the Western Railroad Company and a committee of three of the directors, with the assistance of the chief

engineer, be authorized to contract with Messrs. Hunt and Scales, or other parties, to build said W. R. R. from Egypt to Greensboro'.

The following-named directors were appointed on said committee: D. J. Underwood, W. B. Richardson, T. S. Lutterloh.

Exhibit B, J. M. Rose.

Contract between Western Railroad Company and J. A. Hunt & Co.

Exhibit C, J. M. Rose.

Whereas on the 11th day of October, A. D. 1870, the Western
154 Railroad Company made and concluded with John A. Hunt and Nathaniel E. Scales, copartners, of the firm of J. Hunt & Co., certain articles of agreement, whereby the said J. Hunt & Co. became contractors for the preparation and finishing of all that portion of the Western Railroad except the bridge over Deep River, commencing on the western bank of Deep River and running westward on the line of survey of said road to Greensboro', in the county of Guilford, according to the stipulations, specifications, and conditions mentioned in and annexed to the said articles of agreement, to which reference is hereby made; and whereas, on the 5th day of December, 1870, the said J. Hunt & Co. duly assigned their said contract and agreement, and all their interest therein and thereto, to Thomas S. Lutterloh:

Now, therefore, this agreement witnesseth, that the said Western Railroad Company doth hereby re-affirm the said articles of agreement heretofore made with the said J. Hunt & Co., and covenant anew to and with the said Thomas S. Lutterloh for the due performance of all the stipulations, covenants, and agreements in the said articles mentioned and contained.

And it is hereby further covenanted and agreed by and between the said Western Railroad Company and Thomas S. Lutterloh, the parties hereto, that article 7 of the said agreement heretofore made with J. Hunt & Co., or so much thereof as prohibits the letting or transferring of the contract as assigned to the said Thomas S. Lutterloh, is hereby rescinded, made void, and of no effect, and the following article shall be substituted in lieu thereof, viz:

Article 12. The said mortgage-bonds shall be placed in the hands of the said Thomas S. Lutterloh, contractor, to be held and used by him for the purpose of securing advances of money for the performance of work to be done under this contract; and the said contractor shall account to the said company, whenever thereto required, for all the moneys paid to him heretofore, or which may be paid hereafter,
155 and all the bonds delivered to him heretofore, or which may be delivered to him hereafter, at the par value thereof.

Executed at Fayetteville this January 5, 1871.

A. J. JONES, *President.*
W. B. RICHARDSON,
D. J. UNDERWOOD,
Directors.

Witness:
THOS. C. FULLER.

Exhibit D, J. M. Rose.

TO THE PUBLIC.

OFFICE WESTERN RAILROAD COMPANY,
Fayetteville, N. C., Feb. 23, 1871.

The attention of the public is respectfully called to the following resolutions, unanimously adopted by the board of directors of this company:

OFFICE WESTERN RAILROAD COMPANY,
February 22, 1871.

Extract from the minutes of the board of directors of the above-named day:

Resolved, That the contract made by the late president and directors of this company with J. Hunt & Co. for building the road to Greensboro', and the attempted modification of said contract, purporting to be made by A. J. Jones, president, and two directors, with Thomas S. Lutterloh, be declared void by this board of directors; and we believe said original contract fraudulent and the attempted modification unauthorized; and we further declare that the mortgage attempted to be made by the late president and certain directors void, as also the bonds issued under said mortgage, as this company has in no way received value for said bonds.

Resolved, That the president be instructed to advertise that this company will in no way recognize or pay said bonds, and warn the public against purchasing the same, inasmuch as they have passed out of the control of this company without authority and without consideration.

156 Resolved further, That the president be requested to demand, in the name of this company, all bonds purporting to be mortgage-bonds of this company held by any person whatsoever.

(From the minutes.)

JOHN M. ROSE, *Secretary.*

In accordance with instructions contained in the above resolutions, I hereby demand of any and all persons having such so-called mortgage-bonds in their possession to return the same to the office of this company.

L. C. JONES, *President.*

Exhibit E, J. M. Rose.

Bye-laws of the W. R. R. Co.—(Printed.)

Exhibit F, J. M. Rose.

FAYETTEVILLE, N. C., *April 7th*, 1870.

The annual meeting of the stockholders took place this day, at 1 o'clock, in the town hall.

The meeting was called to order by the president, A. J. Jones. On motion, John M. Rose was chosen chairman, and J. H. Davis ex officio secretary. A committee of three was appointed to ascertain if a quorum of stock was present. The said committee reported a large majority of stock present.

The chairman then announced the meeting ready for transaction of business.

T. C. Fuller moved to adjourn until to-morrow at 10 o'clock, a. m. Carried.

Adjourned until 10 o'clock, 8th.

10 O'CLOCK, *8th April*, 1870.

Meeting met pursuant to adjournment. Duncan G. McRae moved to appoint a committee on proxies, said committee to report from time
157 to time during the meeting. The committee of yesterday was discharged. Motion of D. G. McRae was carried by stock vote—yeas, 28,566; nays, 77. Said committee composed of D. G. McRae, A. W. Steel and J. R. Lee.

The secretary read the annual reports of the president, secretary and treasurer, and engineer and superintendent. Mr. D. G. McRae moved a committee be appointed, to whom should be referred the aforementioned reports, said committee to report to this meeting as soon as practicable. Carried. W. A. Guthrie, J. D. Williams, and H. L. Myrover were appointed on the committee.

Mr. T. S. Lutterloh offered the following resolution:

Resolved, That to enable the Western Railroad Company to raise the money necessary to construct and extend said road to some point on the N. C. Railroad, the president and directors of said Western Railroad are hereby authorized and empowered to issue the mortgage-bonds of said company, in sums of not less than one hundred dollars each, payable in thirty (30) years from the date thereof, with coupons of interest attached, payable semi-annually, at a rate of interest not exceeding eight per cent. per annum; both principal and interest payable at the Bank of the Republic, in the city of New York, or at the office of the company in Fayetteville.

Further resolved, That to secure the payment of said bonds the president and directors of said Western Railroad Company may make a mortgage upon said railroad, with all its property now held by said company or hereafter to be acquired; and said mortgages, signed by the president, and countersigned by the secretary and treasurer, under seal of the corporation, shall be valid and binding from the time the same shall be registered in the county of Cumberland.

John A. McDonald moved to make the interest on the said bonds eight per cent. Carried.

G. W. Lawrence moved to postpone consideration of resolution to mortgage until after 3 o'clock p. m. Carried.

158 A. A. KcKethan moved to adjourn until 3 o'clock. Carried.

Meeting adjourned.

3 O'CLOCK, P. M., *April 8th*, 1870.

Meeting met pursuant to adjournment.

It was moved to lay the resolution of T. S. Lutterloh (in regard to mortgage) on the table until after the election of officers.

Lost by the following vote:

YEAS.

J. W. Baker	1	C. Monroe	1
J. J. Dodd	1	A. W. Steel	20
A. M. Campbell	2	J. G. Shepherd	2
S. J. Hinsdale	10	W. N. Tillinghast	3

Houston & Overby	2	Jos. Utley	5
W. Huske	1	J. T. Warden	2
E. J. Hale	40	L. & Troy (P.)	1
B. Hanes	10	W. W. Whitehead	1
G. W. Lawrence	21	A. M. Hill	10
A. A. McKethan	24	Wm. Huske	2
D. G. McRae	10		
H. L. Myrover	32		227
T. H. Massey	2		

NAYS.

Joel Ashworth	5	J. & T. Waddill, (P.)	13
Cook & Johnson	10	State of N. C.	26,000
G. A. Graham	5	A. J. Jones	10
J. S. Harrington	5	J. H. Davis	5
T. S. Lutterloh	287		
J. A. McDonald	5	Votes	26,349
W. McL. McKay	2		

The chair announced the resolution of T. S. Lutterloh as being
159 before the meeting. The resolution was read by the secretary, upon which a stock-vote was called on the final disposition of the resolution.

The following is the vote by stock:

YEAS.

Elias Bryan	10	G. W. Lawrence	21
Cook & Johnson	10	L. & Troy	1
Co. Cumberland	1,000	J. A. McDonald	5
J. Dodd	1	H. L. Myrover	32
W. A. Guthrie, (P.)	5	T. H. Massey	2
W. A. Guthrie	10	Wm. McL. McKay	2
Geo. Graham	5	State of N. C.	26,000
J. S. Harrington	5	Town Fayetteville	1,000
B. Hanes	10	J. Utley	5
J. W. Hopkins	4	D. J. Underwood	5
A. J. Jones	10		
T. S. Lutterloh	287		26,441
J. R. Lee	5		

NAYS.

Joel Ashworth	5	A. A. McKethan	30
J. W. Baker, jr	1	D. G. McRay	10
J. W. Baker, sr	4	J. G. Shepherd	2
A. M. Campbell	2	D. & W. McLaurin	24
J. T. Gilmore	5		
Houston & Overby	2		86
W. Huske	1		

The resolution of Mr. Lutterloh to mortgage was carried by the above stock-vote.

The committee to whom was referred the different officers' reports reported as follows:

To the stockholders of the Western R. R. Co.:

We, the undersigned, to whom was referred the reports of the president, secretary and treasurer, and superintendent and engineer
160 of the Western Railroad Company, beg leave to report that they have examined said reports and compared them with the books of the company and find them correct. We therefore recommend that said reports be accepted by the stockholders.

Respectfully submitted.

(Signed) W. A. GUTHRIE,
Chairman.
H. L. MYROVER.
J. D. WILLIAMS.

The report was accepted by the stockholders.

Hon. T. C. Fuller moved that the meeting do now go into an election for two directers on part of the stockholders other than the State of North Carolina to serve for the ensuing year. Carried.

The chairman appointed W. A. Guthrie, A. M. Campbell, Jno. H. Cook as tellers.

The following was the vote for president: D. G. McRae received one hundred and sixty-three votes.

FOR DIRECTORS.

H. L. Myrover received		240
J. W. Hopkins	"	2,434
D. J. Underwood	"	2,433
J. D. Williams	"	32
A. W. Steel	"	70
T. S. Lutterloch	"	30
W. A. Guthrie	"	163

The chairman pronounced J. W. Hopkins and D. J. Underwood elected as directors on part of the individual stockholders for the ensuing year. The secretary then read the appointments on the part of the State, viz:

A. J. Jones.
Jas. S. Harrington.
Geo. A. Graham.
Joel Ashworth.
J. A. McDonald.
T. S. Lutterloh.
W. B. Richardson.

161 J. R. Lee was commissioned as proxy for the State of North Carolina. The appointments were forthwith to the parties appointed.

J. A. McDonald moved the following resolution:

Resolved by the stockholders in this meeting, That a resolution passed at the last annual meeting, fixing and locating the terminus of the Western Railroad at or near the town of Salsbury, be and the same is hereby rescinded.

Resolved further, That the terminus of said road be and the same is hereby located at or near the town of Greensboro'. Carried by the following stock-vote:

YEA.

Joel Ashworth	5	Wm. McL. McKay	2
E. Bryan	8	J. M. Rose	13
Cook & Johnson	10	State of N. C.	26,000
Co. Cumberland	1,000	Town Fayetteville	1,000
W. A. Guthrie	10	D. J. Underwood	5
H. B. Guthrie (P.)	5	J. & T. Waddill	13
J. S. Harrington	5	J. Waddill	5
B. Hanes	10	W. Whitehead	1
J. R. Lee	5	L. J. Haughton	18
J. A. McDonald	5		
Geo. McNeil, Ex	89		28,216
Alex McLauchlin	7		

NAY.

J. H. Davis	5	J. G. Shepherd	2
G. A. Graham	5	J. Warden	2
J. W. Hinsdale	10	A. J. Jones	10
Wm. McIntyre	10		
W. B. Richardson	5		61

On motion of T. S. Lutterloh, the following addition was made to the bye-laws of the company :

At each annual meeting of the stockholders a committee of three shall be appointed, who shall not be officers of the company, to exam-
162 ine the accounts of the officers of the company, at the end of the fiscal year, and report thereon on the ensuing annual meeting. The fiscal year shall close on the last day of February, and all books and accounts shall be balanced on that day, and in five days thereafter shall be subject to the inspection and examination of the committee hereby appointed. Said committee shall likewise examine and report on the whole property of the company. The following gentlemen were appointed by the chair as auditing committee for the ensuing year, viz., A. M. Campbell, William Huske, W. McL. McKay.

Mr. McKay offered the following resolution :

Resolved, That this meeting do now approve all the proceedings of this meeting from its commencement to its close, and all acts and resolutions of the same, passed from its commencement to its close, be and the same is hereby approved and ratified.

Upon which a stock-vote was called. The name of the State of North Carolina being, on motion, called first, voted yea, 26,000; nay G. A. Graham, 5; W. B. Richardson, 5.

The above gentlemen voting in the negative asked that their names be recorded.

It was moved to adjourn sine die.

J. H. DAVIS,
Ex off. Secretary.

Exhibit M, J. M. Rose.

FAYETTEVILLE, N. C., *Oct.* 14, 1870.

The committee on contracts met at the company's office. Mr. Lutterloh offered the following resolution :

Resolved, That the committee that was appointed under a resolution

passed by the board of directors of the Western Railroad Company, on August 13, 1870, and in accordance with a resolution passed at the last annual meeting of the stockholders of said company, have contracted, concluded, and closed the contract, which contract is now on file
163 in the company's office, with Messers. Hunt & Scales; and provided further, that the president is hereby authorized and instructed by said committee to advance such sums in bonds or money as will secure the completion of said contract, and pay all monthly estimates as will be made out by the chief engineer.

Exhibit N, J. M. Rose.

AUGUST 13TH, 1870.

At a meeting of the board of directors, held this day:

Resolved, That the president of the Western Railroad Company and a committee of three of the directors, with the assistance of the chief engineer, be authorized to contract with Messrs. Hunt & Scales, or other parties, to build said Western Railroad from Egypt to Greensboro'. The following-named directors were appointed on said committee: D. J. Underwood, W. B. Richardson, T. S. Lutterloh.

Exhibit O, J. M. Rose.

To the president and directors and general superintendent of the Western Railroad Co.:

GENTLEMEN: By the terms of a contract made by the Western Railroad Company with J. Hunt & Co., on the 11th day of October, 1870, which has been duly assigned to me, it is provided (Art. 2d:)

"The engineer shall have power to prescribe the manner of preparing for, beginning, and conducting every species of work to be done under this agreement, with reference to its purpose and the durability of such work, and his instructions shall be promptly obeyed;" and by the specifications annexed and made part of said contract all work done on said road is to be under the supervision and direction of the engineer.

You will please take notice that I am provided with hands and materials to continue work on my contract for preparing and finishing
164 the Western Railroad from Egypt to Greensboro', and that the work staked out and designated by the engineer for the former contractors has all been completed. I respectfully ask that such orders and directions may be given by the engineer as will enable me to do the work to his satisfaction, which I am ready and willing and able to do. I shall hold the company to a strict responsibility for any loss that may arise to me from a failure on the part of the engineer to stake out and designate the work to be done in advance of its performance, and for all neglect of his duty, as stipulated and agreed in said contract.

Very respectfully,

T. S. LUTTERLOH.

FAYETTEVILLE, *Jan. 30th*, 1871.

To the president and directors of the Western Railroad Co.:

GENTLEMEN: I call your attention respectfully to the fact that on the 30th day of January, 1871, I notified you that I was prepared to continue the work of building the Western Railroad, from Egypt to Greensboro', according to the terms of your contract with J. Hunt & Co., duly

assigned to me. I have now to inform you that I am still ready to prosecute said work, according to the letter and spirit of the contract, and to request that you will instruct your engineer to lay out and stake out said work, so that I may complete it to his satisfaction, or, if you decline to do so, please to let me know the ground of such declension.

T. S. LUTTERLOH,
Contractor.

FAYETTEVILLE, N. C., *Feb. 23d*, 1871.

Exhibit P, J. M. Rose.

At a meeting of the board of directors, Jan. 19th, 1871, on motion, a committee of three was appointed to confer with the contractors for the extension of this road, and to ascertain the terms of the contract, and his intention relative to the prosecution of the work, and report to the board of directors on the 26th inst.

165 JANUARY 21ST, 1871.

At a meeting of the board of directors, Jan. 21st, 1871, the committee appointed at the last meeting to wait upon T. S. Lutterloh, who claims to be a contractor to build the entire road of this company to Greensboro', made a verbal report of their interview with Mr. Lutterloh, with a written proposition from Mr. Lutterloh, as follows:

"I propose to give up the bonds and all contract, (except grading from Gulf to Ore Hill,) the company paying—

To my attorneys, by note or otherwise, to their satisfaction.	$1,250 00
Notes at 3, 6, 9, and 12 mo's, endorsed and secured by pledge of a like am't of bonds	50,000 00
Company note or order on A. J. Jones to pay this am't out of any funds that may be or may come into his hands from sale of special tax bonds	100,000 00
	$151,250 00

I am offered $45,000 profit on the bonds, and I think I can sell them for $90,000. The contract is good for a profit of $200,000 to $250,000."

Exhibit Q, J. M. Rose.

FAYETTEVILLE, *Jan. 30th*, 1872.

At a meeting of the board of directors, J. D. Williams, E. J. Lilly, A. A. McKethan, and W. A. Guthrie were appointed a committee to make some arrangement whereby a judgment against this company in the United States court, in favor of M. W. Baldwin & Co., can either be paid or bought by or assigned to some person who can indulge the company in its payment.

FEB. 17TH, 1872.

At a meeting of the board of directors the following resolution was passed, viz:

166 Resolved, That the five hundred thousand dollars of the Wilmington, Charlotte and Rutherford Railroad Company bonds, owned by this company, with the coupons attached, be placed in the hands of E. J. Lilly, J. D. Williams, and A. A. McKethan, to sell the same, or exchange them with the treasurer of the State for other bonds, and sell them at their discretion; the proceeds of the same to be applied

by them, if sufficient, to the payment of a certain judgment against this company, for about thirty thousand dollars, in the Federal court of this State, in favor of M. W. Baldwin & Co., which the said E. J. Lilly, J. D. Williams, and A. A. McKethan, agree to buy and have transferred to them, or to return the proceeds of such sale to the Western Railroad Co; the said Lilly, Williams, and McKethan having the right conceded to them by this board to proceed to sell at any time the property, real and personal, of this company, to satisfy said judgment, provided a sufficient amount cannot be realized by the sale of the bonds above named. Provided, that if an amount more than sufficient to pay the judgment described, with commissions to said Lilly, Williams, and McKethan, at the rate of ten per cent. per annum on the amount of the judgment until paid, with all expenses incurred in the sale of the said bonds of the Wilmington, Charlotte and Rutherford Railroad Company; this, in addition to eight per cent. per annum, interest on the amount of the judgment and costs, to return the overplus to said Western Railroad Company.

Exhibit R, J. M. Rose.

FAYETTEVILLE, N. C., *March* 31, 1873.

To the president and directors of the Western Railroad Co.:

I submit the following statement, viz:

No. 1. A general stock-statement.
" 2. A list of balances due on stock.
" 3. A statement of the earnings and expenditures of the company from March 1, 1872, to March 1, 1873.
" 4. Annual balance-sheet to March 1, 1873.

167 From the above statements it will be seen that the capital stock of the company stands as follows:

Amount subscribed by State		$1,100,000
" "	county	100,000
" "	town	100,000
" "	individuals	133,900
		$1,433,900

PAID.

By State	$1,100,000	
" county	100,000	
" town	100,000	
" individuals	133,059	48
Due by individuals	840	52
	$1,433,900	

Of the amount paid by the State, 500,000 of the Wilmington, Charlotte and Rutherford Railroad bonds remain in the hands of the Western Railroad Company, and the $840.52 due by individuals is mostly collectable.

The following credits still stand upon the books of the company, but are known to have been paid by A. J. Jones, late president, and not entered on books:

Bills payable, (old)	$6,319 77
H. Sanders	943 75
L. J. Haughton	4,515 95
Bills payable, (new)	4,599 01
A. J. Jones, president	25,392 99
	$41,771 47

The matters between the company and A. J. Jones, president, being in litigation, their accounts have been kept open on the books.

The liabilities of the company on old accounts are as follows, viz:

168 Judgment in the Baldwin debt, held now by A. A. McKethan, J. D. Williams, E. J. Lilly, Henry Lilly, and A. W. Steel	$31,426 49
A confederate note for $3,500, due bank of Fayetteville, will scale to	600 00
A judgment in the hands of J. M. Rose for Troy Nail and Iron Company, say, principal and interest	1,100 00
A debt to J. R. Andrews & Co., say	400 00
	$32,526 46

The balance-sheet includes all February operations and to 1st March, much of which has and will be settled in current March and April accounts.

DUE AS FOLLOWS.

Pet. Railroad Co	$37 49
Baltimore S. P. Co	110 04
R. and G. R. Co	165 25
S. and R. R'd (tickets)	53 00
Phil., Wil. and Balt. R. R. Co	200 21
N. J. R. R. Co	66 66
R. and A. R. R. Co., (frt. acct.)	6,066 69
Penn. R. R. Co	261 91
R. and A. R. R. Co., (tickets)	635 50
B. and O. R. R. Co	2 28
R. F. and P. R. R'd	45 78
N. C. R. R	8 27
	$7,593 08

And some other small and unimportant amounts. To pay which there is shown against—

N. A. Stedman, tr.	$2,116 00
J. F. Marsh, agent, transferred to treasurer	5,683 44
S. and R. R. Road	1,207 23
	$9,006 67

And some other small and unimportant assets.

169 The road and equipment cost	$1,044,304 03

We derived from stock, (less 500,000 of W. C. and R. R. R'd bonds)	$933,059 48
And used current receipts to pay for same	110,644 55
	$1,044,304 03
The entire amount of freight earned by the consolidated through line, to and from this line, for year ending March 1, was	$101,956 34

All of which is respectfully submitted.

JNO. M. ROSE,
Secretary, &c., W. R. R. Co.

Exhibit S, J. M. Rose.

For and in consideration of the sum of five dollars, to me in hand paid by L. C. Jones, president of the Western Railroad Company, the receipt whereof is hereby acknowledged, I hereby surrender all my right, title, and interest in and to a certain contract and agreement entered into between the Western Railroad Company and J. Hunt & Co., on the 11th day of October, 1870, which said contract was transferred to me by the said J. Hunt & Co. on the 5th day of December, 1870; and I hereby covenant and agree to do all and everything necessary in the premises to relieve the said Western Railroad Company from all and every liability or liabilities arising from said contract and all subsequent modifications thereof.

And in further consideration of the sum of five dollars, paid to me by L. C. Jones, president, as aforesaid, I hereby release and convey to the said Western Railroad Company all my right, title and interest in and to certain mortgage-bonds issued by the said Western Railroad Company on the 31st day of October, 1870, part of which said bonds
170 are in my possession and part in the possession of L. P. Bayne & Co., New York.

Witness my hand and seal this 16th March, 1871.

T. S. LUTTERLOH.

Test:
JNO. M. ROSE.

Exhibit A, M. A.

STATE OF NORTH CAROLINA,
Cumberland County:

Personally appeared before me, Alexander McPherson, clerk of the superior court of Cumberland County, Matthew Atkinson, master-machinist of the Western Railroad Company, who, being duly sworn, deposes and says that the annexed letter addressed to L. C. Jones, president of said company, contains a true statement of the condition of the property of the company within his, Atkinson's, immediate department, when it came into the possession of the present administration, and the improvements made thereon since January, 1871.

M. ATKINSON.

Sworn before me this 12th June, 1873.

A. McPHERSON, JR.,
Clerk Superior Court Cumberland County.

JUNE 5, 1873.

Mr. L. C. JONES, *President W. R. R.:*

SIR: Replying to your order of May 21, requiring statement of exact condition of engines, rolling-stock, stations for water, and machinery connected with this department; also what improvements, if any, had been made in said machinery, &c., since January, 1871, you will
171 find in my report to you, February 13, 1871, that the four locomotives owned by this company were in the following condition:

Engine No. 1. Tires and truck-wheels worn out, truck-boxes and pedestals worn out, and fire-box in bad condition. It has been repaired with new cast-steel tires, new truck-wheels, boxes, and pedestals. This engine has recently been thoroughly repaired, and is now in good running order.

Engine No. 2. Tires, pumps, guides, pump-arms, crank-pins, worn out, and one check broken, and the rest of the engine-work in very bad condition. It has been refitted with new steel tires, pumps, guides, check, pump-arms, crank-pins, &c. She has otherwise undergone a very general repair, and is in good running order.

Engine No. 3 was entirely disabled; one cylinder-head torn out, and left engine badly damaged; crack in boiler, and leaking badly. This has been fitted with new cylinder-head, and engine repaired. It is now laid up for repairs of engine and boiler; new yokes for links, hangers, link blocks, radius and eccentric rods in an advanced stage of construction.

Engine No. 4 I found in the shop undergoing repairs, which were completed under my supervision. This engine has been thoroughly repaired, and is in good condition. I found stationary boiler in a dangerous condition. This has been repaired as well as engine, which has been fitted with a new Judkins governor and detached pump, and are both now in good order.

The machinery in shop consisted of two lathes, one planer, and one drill. The larger of the two lathes in good order; all the rest of the machinery much worn. With the exception of some slight repairs, and resetting these machines upon stone foundations, they are about in the same condition. There has been added to these one gear-lathe, 22 in. swing, 10 feet bed.

The rolling-stock consisted of two coaches, four box-cars, one stock, three gravel, and eighteen flat cars.

172 The wheels under all, except two of the gravel-cars, were so completely worn out as to require almost an entire new equipment; the two coaches were in fair order; two of the boxes in good, the other two in bad condition. Of the eighteen flat-cars, some needed repairs, but the whole might be considered in fair condition.

All of these cars, except three, have been fitted with new wheels and axles, entailing considerable expense in altering and rebuilding trucks to fit a standard gauge of axle. It was also found necessary to throw away the old wooden brakes and replace them with iron.

Of the two coaches then on hand, one has been repaired and painted; both are in good running condition. Of the four box cars, one has been repaired and is waiting for wheels; one has been converted into a baggage car. All four are in good order. Of the eighteen flats, two need repairs; the rest are in excellent condition.

There has been added to the above-named rolling-stock two new coaches, three new box-cars, and one baggage and mail car; all of which are in excellent order.

The section-cars are in good order. Eight of them have been supplied with new wheels.

Water-station No. 1 I found much decayed. It has been entirely rebuilt, the pump and machinery repaired, and fitted with new pipes.

Station No. 2 has been supplied with new water-wheels; machinery for working pump repaired, and fitted with new suction-pipe.

No. 3 is a new station.

No. 4 has required but little repair. All of these stations are in good order, and have been fitted with new gum hose.

In closing this statement I have to inform you that, finding a reduction of my force admissible, I have discharged some hands in shop.

M. ATKINSON, *M. M.*

173 *Exhibit A, with H. W. Howell's testimony.*

NEW YORK, *Dec. 22d*, 1872.

Received of T. S. Lutterloh, esq., contractor of Western Railroad Company, four hundred and twenty-five bonds, the same held by us for his account, subject, however, to our acceptance of a draft for twenty thousand five hundred and twenty-three dollars and ninety-three cents, in favor of R. Y. McAden, esq., of N. C., and subject also to such advances as we may make upon his order; we, for the above advances and acceptances, having power to hypothecate said bonds or any part of them.

L. P. BAYNE & CO.

Exhibit A.

This copy of Exhibit A. is filed with deposition in place of original, withdrawn by defendant, W. R. R. Co., by consent. Original to be produced when required.

For value received, I hereby transfer all my right, title, and interest in and to the within receipt, and transfer the within bonds to the Western Railroad Company.

This 16th day of March, 1871.

T. S. LUTTERLOH.

Test:

JNO. M. ROSE.

The State of North Carolina to Geo. Graham, greeting:

We, reposing special trust in your integrity and knowledge, do, by these presents, appoint you proxy to represent the interest of the State in the "Western Railroad Company," to take effect from date, and continue until your successor is appointed, and do hereby confer upon you all the rights, privileges, and powers useful and necessary to
174 the just and proper discharge of the duties of your appointment.

In witness whereof his excellency W. W. Holden, our governor, captain-general, and commander-in-chief, hath signed with his hand these presents, and caused our great seal to be affixed thereto.

Done at the city of Raleigh, on the 2d day of March, in the year of our Lord one thousand eight hundred and sixty-nine, and in the ninety-third year of our Independence.

[L. S.] W. W. HOLDEN.

By the governor:

H. J. MENNINGER,
Secretary of State.

The State of North Carelina to James R. Lee, greeting:

We, reposing special trust and confidence in your integrity and knowledge, do, by these presents, appoint you "proxy," on behalf of the State of North Carolina, to represent the State in the Western Railroad Company, to take effect from date, and continue until your successor is appointed; and we do hereby confer upon you all the rights, privileges, and powers useful and necessary to the just and proper discharge of the duties of your appointment.

In witness whereof his excellency William W. Holden, our governor, captain-general, and commander-in-chief, hath signed with his hand these presents, and caused our great seal to be affixed thereto.

Done at the city of Raleigh, on the 5th day of April, in the year of our Lord one thousand eight hundred and , and in the ninety- year of our Independence.

[L. S.] W. W. HOLDEN.

By the governor:

H. J. MENNINGER,
Secretary of State.

175 *Exhibit with L. C. Jones' testimony.*

STATE OF NORTH CAROLINA,
Cumberland County:

Personally appeared before me, Alexander McPherson, clerk of the superior court of said county, L. C. Jones, president of the Western Railroad Company, who, being duly sworn, deposeth and sayeth as follows, viz:

That the annexed statement of rolling-stock, repairs, materials, &c., have been added, by purchase or otherwise, to the value of the property of the Western Railroad Company since January, 1871, when the present administration came into possession of the property of the company.

L. C. JONES.

Sworn to and subscribed before me this 12th June, 1873.

A. MCPHERSON, JR.,
Clerk S. C. Cumberland County.

2 passenger-coaches purchased and thoroughly repaired	$5,000 00
1 new baggage-car	3,500 00
Freight-cars	2,600 00
New wheels and axles (2½ sets)	4,300 00
1 new lathe	250 00
2 new turnouts	500 00
New material on hand	1,050 00
1 new car-house at Egypt	615 00
1,000 cords of wood	1,500 00
18,000 cross-ties, 35	6,300 00
Improvement in value of buildings	850 00
New car-house in Fayetteville, nearly completed	1,100 00
New water station and tank	600 00
New conduit	200 00
New head-lights	300 00
New frogs	285 00
176 1 new yard-track	100 00
2 new platforms	120 00
Steel tires for 2 locomotives	926 00
Replacing wooden brakes with iron	250 00

Old debts paid, contracted by previous administrations....	11,309 54
New wheels received and under construction.....	580 00
	$42,235 54

176½ Afterwards, to wit, at November term, 1873, of said court, the report of the commissioner appointed herein is filed, with leave to each party to file exceptions thereto within thirty days, which said report is as follows:

Circuit court of the United States for the fourth circuit and eastern district of N. C.

HENRY W. HOWELL, PLAINTIFF,
against
THE WESTERN RAILROAD CO., DEFENDANTS.

The undersigned, appointed commissioner in the above acaction, by order of court made at June term, 1873, to take the evidence therein, and report the same to court with his findings thereon, submits his report, as follows:

In the examination of witnesses and the argument before the commissioner, the plaintiff was represented by Messrs. Merrimon, Fuller & Ashe, and the defendants, except Lutterloh, McAden and Rogers, were represented by Messrs. Smith & Strong and J. C. McRae, esq.

The following witnesses were examined on behalf of the plaintiff, to wit, R. M. Orrell, W. R. Love, W. J. Hawkins, and A. B. Andrews. The plaintiff also used the deposition of W. H. Howell, duly taken in this cause.

The following witnesses were examined on behalf of the defendants, (with the exceptions above:) J. M. Rose, L. C. Jones, A. A. McKethan, John D. Williams, M. Atkinson, D. G. McRae, T. R. Caldwell, and John C. Windser. The defendant also used depositions of James Dougherty, jr., and T. A. Whitaker, duly taken in this action. The evidence of all these witnesses, with the exhibits filed therewith, and referred
177 to in their evidence, is herewith filed, as part of this report. The plaintiff and defendants also filed exhibits as evidence, all of which are marked and filed with and as part of this report.

From the evidence, the commissioner finds the following facts:

I. The defendant, the Western Railroad Company, is a corporation duly created and organized, and acting under and by virtue of an act of the general assembly of North Carolina, ratified 24th December, 1852, and entitled "An act to incorporate a company to construct a railroad from some point on the Cape Fear River, at or near Fayetteville, to some point in the coal-fields yet to be determined."

To this act there are several amendatory acts, all of which together now constitute the charter of the company. These are contained in the pamphlet filed as an exhibit in this action, to each of which reference will be more particularly made as occasion may require in this report.

II. By the original act, or charter (sections 23 and 24) of the company, it is authorized to make and issue bonds to an amount not exceeding $400,000; and to secure the same by a deed in trust or mortgage on the road, property, income, and franchises of said company. By an amendment passed at the session of 1856–'57, (section 1,) these two sections are amended so as to authorize the company to issue their bonds to any amount, and at any rate of interest which it might think proper, and to

secure the same by mortgage on all the real and personal estate, together with all the franchises and privileges of the company.

III. By the act ratified on the 20th December, 1866, (section 3, page 24 of pamphlet,) the president and directors of the company are authorized to issue mortgage bonds of the company in sums of not less than $100 each—not to exceed in amount $900,000—to be negotiated at not less than par, and not to mature at an earlier period than thirty years, payable at such time and place, and at such rate of interest, not exceeding eight per cent. per annum, as may be authorized by
178 the company, and to secure the payment thereof by mortgage on the railroad and all its property or income "in such manner and form as they may determine." It will be observed that there is a seeming inconsistency in this section as to the time of payment of these bonds, it being in one place provided that they shall not "mature at an earlier period than thirty years," and in the other that they shall be "payable at such time and place as may be authorized by said company."

IV. By the 3rd section of an ordinance of the convention of 1868, ratified 17th of March, 1868, (see page 30 of pamphlet,) so much of this act as prohibits the company from negotiating the bonds at less than par is repealed.

V. On the 7th day of April, 1870, a general meeting of the stockholders of said company was held in the town of Fayetteville, in which a large majority of the stock was represented. (See "Exhibit F, J. M. Rose," page 18 of printed evidence.)

In this meeting it was resolved, That * * * * * * * * * * * the president and directors * * are hereby authorized and empowered to issue the mortgage-bonds of the said company in sums of not less than one hundred dollars each, payable in thirty years from the date thereof, with coupons of interest attached payable semi-annually, at a rate of interest not exceeding eight per cent. per annum, both principal and interest payable, &c.

Further resolved, That they make a mortgage upon said railroad, with all its property now held by said company or hereafter to be acquired; said mortgage to be signed by the president, and countersigned by the secretary and treasurer under the seal of the corporation, and to be valid and binding when registered in the county of Cumberland. (See page 119 of evidence.)

VI. That one George Graham was present at this meeting and claimed to represent the stock owned by the State in this company under a proxy signed by the governor of the State, dated 2nd March, 1869. (Page 135 of evidence.) A committee was appointed to inquire and report
179 if a majority of the stock was represented. The committee reported that a large majority of the stock was represented, which was concurred in, and the meeting was organized and proceeded to transact business.

After the resolutions mentioned above were adopted, A. J. Jones, the president of the company, produced a proxy from the governor to one James R. Lee, appointing him proxy on behalf of the State, and conferring on him all the rights, privileges, and powers of such proxy. This proxy is dated 5th April, one thousand eight hundred and . (Page 136.)

After its delivery to said Lee, a resolution was introduced and adopted, ratifying and confirming all that had been previously done in the meeting. (Page 124 of evidence.) The commissioner holds that for all purposes of this action these proceedings are legal and valid, so far as the rights of the holders of the bonds of this company are affected thereby.

VII. The commissioner therefore finds that the president and directors of said company were authorized by acts of the general assembly, and by authority from the stockholders of the company, to issue coupon-bonds of the company, amounting to $900,000, bearing interest at the rate of eight per cent. per annum, payable semi-annually, and the principal payable at the end of thirty years, and to execute a mortgage on the railroad, with all its property then held, or to be acquired by said company, to secure the payment thereof.

VIII. That the president and directors did issue nine hundred coupon-bonds of $1,000 each, with coupons for interest at the rate of eight per cent. per annum, payable semi-annually, a copy of which is contained in the mortgage, and five of *of* which are held by plaintiff and filed with his complaint, and did execute a mortgage to secure the same; which bonds and mortgage are signed by the president and countersigned by the secretary and treasurer of the company, as required by the resolution aforesaid, and the said mortgage is also registered in the county of Cumberland. The said bonds and mortgage are dated 31st October, 1870.

180 IX. In the face of the bonds was inserted this provision: "In case of the non-payment of any coupon in full upon presentation and demand thereof, when due at the said bank, and default of payment thereof shall continue for six months after such presentation and demand, then the principal of this bond shall become due and payable as provided in the deed of trust or mortgage made to secure the payment thereof, as though the whole period of thirty years had elapsed." And in articles II and III of the mortgage, it is fully provided that in case of default in the payment of any coupons—continuing for six months—the trustees shall have full power and authority to enter upon and take possession of said road, and all its property, and to run, manage, and control it, with all its property and business; and to proceed to sell the same, and pay the whole amount of principal and such part of interest as might be then due.

X. A copy of the third section of said act of the general assembly of 20th December, 1866, is printed in full on the back of each of said bonds.

XI. By the said mortgage, all the franchises or rights connected with and relating to said road are conveyed to the trustees.

XII. That Rufus Y. McAden and Thomas S. Lutterloh, citizens of North Carolina, and Henry J. Rogers, a citizen of New York, were appointed trustees in and by said mortgage, and duly accepted the said trust by signing their names thereto.

XIII. That Andrew J. Jones, who was then president of the company, delivered five of the said bonds to Henry J. Rogers, as compensation for his services as one of the trustees to said mortgage, and that he paid no other compensation or consideration for said bonds, (page 60, bottom of evidence,) and that said Rogers rendered no service as such trustee, except to agree to act as such, and to execute said mortgage as aforesaid.

XIV. That the five bonds thus delivered by Jones as president, to Rogers as trustee, were by him transferred to the plaintiff in this action in December, 1870, and are the five bonds on which this action is brought.

181 XV. That said A. J. Jones, president of said company, also delivered at the same time to R. Y. McAden and T. S. Lutterloh, trustees as aforesaid, each, five of said bonds.

XVI. Of these last-mentioned ten bonds, five have been reconveyed to the company by T. S. Lutterloh. There is no evidence before the

commissioner that McAden has ever disposed of those bonds delivered to him.

XVII. Of the remaining eight hundred and eighty-five of these bonds, four hundred and sixty have been returned to the company by T. S. Lutterloh, who obtained possession of them in the manner hereinafter stated, and are now in its possession. The other four hundred and twenty-five are now in the possession of L. P. Bayne & Co., of New York, (or of some other person for them,) having been delivered to them by T. S. Lutterloh, on the terms and conditions mentioned and set out in the receipt of L. P. Bayne & Co. to T. S. Lutterloh for the same, a copy of which is filed with the evidence herein. (See page 135, Exhibit A. with evidence of H. W. Howell.) And the said Lutterloh, on 16th March, 1871, transferred all his right, title, and interest in the said receipt, and transferred the said bonds to the Western Railroad Company. (See transferred on receipt and copy on page 135 of evidence.)

XVIII. The said L. P. Bayne & Co. now claim that they hold the said four hundred and twenty-five of said bonds, delivered to them as above said, as collateral security for a debt seventy-one thousand eight hundred and ninety four dollars, due them by the Western Railroad Company, with interest from February, 1871.

XIX. On the 6th day of November, 1871, the plaintiff, Henry W. Howell, presented one of the coupons of bond No. 38 at the Bank of the Republic, in New York, and demanded payment thereof, which was refused, whereupon he caused the said coupon to be duly protested for non-payment, of which the defendant, the Western Railroad Com[illegible], had legal notice; and such default of payment continued for more than six months before the commencement of this action, and the Western Railroad Company has not at any time provided funds for the payment of the coupons of said bonds.

182 XX. That at a meeting of the board of directors of the said company, held on the 13th August, 1870, it was resolved that the president and a committee of directors, with the assistance of the chief engineer, be authorized to contract with Messrs. Hunt & Scales, or other parties, to build the road from Egypt to Greensboro'. D. J. Underwood, W. B. Richardson, and T. S. Lutterloh were appointed on this committee.

XXI. On the 11th October, 1870, the said president and the committee did make a contract with J. A. Hunt & Co. to construct the said road between the two points above named. A copy of this contract is filed, marked "Exhibit B," with answer, page 35. The said contractors commenced work, but did only a small amount of work on the road. By the contract made by the company with J. A. Hunt & Co., it was agreed that the contractor should not let or transfer this contract, or any portion of the same, to any other person without the consent of the engineer. It was further agreed that the railroad company should place the said mortgage-bonds in the hands of an agent, to be held subject to the joint order of the president of the company and the said contractors.

And by resolution of the committee on contracts, passed on the 14th October, 1870, the president is authorized and instructed to advance such sums in bonds or money as will secure the completion of said contract, and to pay out all monthly estimates made out by the engineer.

XXII. On 5th December, 1870, the said Hunt & Co. assigned the said contract to T. L. Lutterloh, and on the 4th January, 1871, this transfer and assignment were approved by L. C. Jones, chief engineer of the company, by order of the board of directors.

And on 5th January, 1871, the said contract is re-affirmed with said Lutterloh, and the 7th article thereof rescinded and made void, and the 12th article is so modified and altered as to provide that the whole of the mortgage-bonds shall be delivered to said Lutterloh, to be accounted for by him with the company whenever thereto required at not
183 less than par. This amended contract is signed by A. J. Jones, president, and W. B. Richardson and D. J. Underwood, directors.

XXIII. At the time of the execution of the contract with J. A. Hunt & Co., and of the assignment thereof to said Lutterloh, and the execution of the amended contract, said Lutterloh was a director in this company, and a member of the contracting committee, and was also made a trustee in the mortgage.

XXIV. After the assignment of the said contract to him, and before the assent thereto by the engineer, and amendment thereof, as above said, the said Thomas S. Lutterloh obtained possession of eight hundred and eighty-five of the said mortgage-bonds, and has disposed of them as hereinbefore stated.

XXV. There is no evidence that, at the time the five bonds were delivered to Henry J. Rogers, as trustee, by A. J. Jones, as president of said company, the said Rogers had any notice of the alleged fraud or illegality in the execution of the said bonds and the mortgage to secure the payment thereof. This, however, not to embrace the alleged illegality in the time of payment of said bonds.

XXVI. The plaintiff, Henry W. Howell, purchased these five bonds from said Henry J. Rogers for value in December, 1870, and is the owner and holder thereof, without notice of the alleged fraud or illegality in the execution thereof, or in the execution of the said mortgage, and without notice of the alleged fraud or illegality in the delivery thereof to the said Rogers by said A. J. Jones. This, however, not to embrace the alleged illegality in the time of payment of said bonds.

XXVII. At the time of the execution of the said mortgage, the said company was the owner and holder of $500,000 of the bonds known as the second-mortgage bonds issued by the Wilmington, Charlotte & Rutherford Railroad Company, and secured by a second mortgage on said road and its property, there being a first mortgage to secure a debt of $, executed by said Wilmington, Charlotte & Rutherford Railroad
184 Company on the same property. These bonds were conveyed as part of the property of the said Western Railroad Company in the mortgage executed by it to the trustees aforesaid, for the uses and purposes therein declared.

XXVIII. The Western Railroad Company had contracted a debt to one M. W. Baldwin & Co. for a large sum. Suit was brought on this debt in the U. S. circuit court, and judgment recovered against said company at June term, 1871, of said court, in favor of Baird, surviving partner of said firm, for the sum of $29,910.46. The defendant in this action had no legal defense thereto, and the said judgment was rendered in invito, and without any fraud or collusion on the part of the defendants therein. On this judgment execution was issued and levied on the road of the defendant, and its franchises and property, and the U. S. marshal was proceeding to execute the said process by the sale of property levied on. To prevent the sale, which it was apprehended would cause a great sacrifice of the property of the company, it being then unable to raise ready money to pay this judgment, the defendants, J. D. Williams, E. J. Lilly, Henry Lilly, A. A. McKethan, and A. W. Steel, with their own funds, at the request of the company, they being, with the excep-

tion of Henry Lilly, directors and officers thereof, purchased the said judgment and execution, and caused the same to be transferred to them for their own use and benefit.

XXIX. Since the purchase of the said judgment the defendant therein, to wit, the Western Railroad Company, has paid the said J. D. Williams and others, assignees thereof, interest at the rate of eighteen per cent. per annum on the amount advanced for said purchase, up to the time of the partial payment hereinafter mentioned, and at the same rate on the balance due from that time, out of its current receipts.

XXX. The said company, by an arrangement between it and the said J. D. Williams and others, made a compromise with the said Wilmington, Charlotte & Rutherford Railroad of certain matters in litigation between the two companies, whereby the said Western Railroad realized
185 $17,500.00 on said Wilmington, Charlotte & Rutherford Railroad bonds and coupons, which sum has been applied to the satisfaction, in part, of the judgment spoken of above, now held by said J. D. Williams and others.

XXXI. These bonds constituted a part of the property conveyed by the said Western Railroad Company to the trustees aforesaid as a security for the payment of its bonds, and were disposed of, and the proceeds applied as above stated, without the knowledge or consent of said trustees.

XXXII. The said Wilmington, Charlotte & Rutherford Railroad Company has since been sold under the provisions of the first mortgage, and the proceeds of sale have been applied to the payment of the bonds secured thereby. There is a large balance of said bonds still due and unpaid.

XXXIII. The compromise and adjustment of said litigation between the two roads was wise and judicious on the part of the Western Railroad Company, and without some such arrangement the whole of said bonds would have been lost to the company.

XXXIV. The debt of the Western Railroad Company, spoken of as the floating debt, is about $16,000. The plaintiff holds five of its bonds of $1,000 each, and R. Y. McAden holds five of $1,000 each. Four hundred and twenty-five bonds of $1,000 each are held by L. P. Bayne & Co. as security for an alleged debt of $71,894.00. These sums make the debt of the company $97,894.00, with interest.

Floating debt	$16,000
Five bonds held by plaintiff	5,000
Five bonds held by McAden	5,000
Debt claimed by L. P. Bayne & Co	71,894
	$97,894

But if the debt of the company is to be regarded in this action as the amount of the bonds outstanding, without reference to the manner in which they are held, then the debt of the company is $451,000. The commissioner is of the opinion that it should be estimated by the amount claimed, and not by amount of bonds outstanding.

186 XXXV. The road, with its franchise and property, to be held, run, and used as a railroad, if sold at public sale for cash, would bring between $130,000 and $150,000, probably nearer the latter sum. If its property was sold, to be severed and removed, and used as the purchaser might think proper to use it, it would sell for between $225,000 and $250,000.

XXXVI. The company is not insolvent unless its indebtedness is estimated by the amount of outstanding bonds, without reference to the amount actually claimed to be due and secured by them. If the amount of bonds in the hands of third parties as herein stated is regarded, for the purposes of this action at its present stage, as the indebtedness of the company, then its property would not sell for that amount, and the company is insolvent and unable to pay its debts.

XXXVII. The affairs of the company have been well managed under the administration of its present officers. Its property is now more valuable than when the mortgage was executed, and the security for the plaintiff's debts is better than at that time.

XXXVIII. No engine, cars, or rolling-stock have been purchased with the means of the company, and the title thereto taken in the name of the defendant John D. Williams or any other person. The engine particularly mentioned in the pleadings was purchased by J. D. Williams and others with their own means, and is let or hired to the company at a rate which is not exorbitant.

Several questions of law having been fully and ably argued by the learned counsel who appeared in this action, the commissioner, with great deference and respect for the court, submits his decision thereof:

I. The meeting of stockholders of the Western Railroad Company of 7th April, 1870, was a duly-constituted meeting, and a majority of the stock was represented therein. George Graham legally represented the stock owned by the State under and by virtue of a *the* proxy then held by him. Upon the delivery of the proxy to James R. Lee, the authority of Graham ceased, and Lee became legally entitled to represent
187 the stock of the State in said company. The proceedings of the meeting are valid and binding on the company. The resolution ratifying all that had been previously done cured any irregularity which might have been in the proceedings before that time.

II. The said company, under the acts of the general assembly before referred to, and the resolution of the said general meeting of the stockholders, had full power and authority to issue coupon-bonds to an amount not exceeding nine hundred thousand dollars, payable in not less than thirty years, with interest at a rate not exceeding eight per cent. per annum, and to execute a mortgage on its road and all its property and income to secure said bonds.

III. The company did not have authority under the act of 20th December, 1866, to mortgage its franchise, and so much of the said mortgage as attempts to convey the said franchise is illegal and void.

IV. The act of 20th December, 1866, being accepted by the company, and the power therein conferred having been attempted to be exercised, is an implied repeal of the act of 1856–'57, and of 23 and 24 sections of act of 1852, above referred to, so far as inconsistent therewith.

V. These bonds are negotiable securities, and the plaintiff, being the bona-fide holder for value of five of them, had the right to presume that, as the company was authorized to issue them, all precedent requirements had been complied with, and the company cannot show in this proceeding a failure of compliance on its part with formalities required by the statute, or of fraud in its own agents in issuing them.

Soe Grand Chute v. Wineger, 15 Wallace, 355, in which many other cases are cited and commented on.

VI. The 3rd section of act of 1866 being printed on the back of each bond, every bondholder is affected with express notice of the limitations therein contained on the power of the company to issue these bonds; and if such actual notice did not exist in this case, yet all persons deal-

ing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation.
188 (Pearce v. Madison, &c., Railroad Company, 21 Howard, 441.) And all persons dealing with corporations are deemed to have notice of limitations upon their power, whether contained in their charter or in the general law.

VII. The company had no power to issue bonds payable in less than thirty years, either directly or indirectly, nor to insert in bonds which it was authorized to issue any provision whereby such bonds might become due or mature at an earlier period than thirty years. The bonds sued on, containing such provision, are consequently not authorized by the act of the 22nd December, 1866, and are therefore ultra vires, illegal, and void.

VIII. Under the authority of Galveston Railroad Company v. Cowdry, 11 Wallace, 459, the debt of the company for the purposes of this action in its present stage would be the floating debt and outstanding bonds. This, however, is modified by the fact which is found by the commissioner, that the four hundred and twenty-five bonds held by L. P. Bayne & Co. are not claimed by them as purchasers or owners, but are only held as collateral security for the payment of $71,894. Therefore, only this latter sum is to be considered in estimating the debt of the company.

The commissioner has not given reasons for his conclusions on matters either of fact or law. But considering the great importance of one of the questions of law decided by him, he hopes it will be deemed not inappropriate to depart from this rule as to this point.

In the case of Bissell v. The Mi. So. & N. In. Railroad, 22 New York Ct. Ap. Reports, 258, Seldon, Judge, says: "It has been so often and so uniformly decided that corporations are not bound by contracts which are clearly ultra vires, that to hold the contrary now would take the legal profession by surprise, and introduce more or less confusion into this important branch of the law." (22 N. Y., 282, and cases cited.)

This principle has been so often announced and acted on in the courts of this country and England that it has long ceased to be an open question.

189 Commonwealth v. Smith, 10 Allen.
White v. Franklin Bank, 22 Pick., 181.
Aspinwall v. Comms. of Daves Co., 22 How., 364.
Pearce v. Madison, &c., R. R. Co., 22 Conn., 502.
Angell & Ames on Corporations, sections 256 and 257, and cases cited.
Bank of U. S. v. Owens, 2 Peters, 527.

It is also familiar learning that a corporation can do nothing which is not authorized by its charter. Bank v. Earle, 2 Peters, 519; Wiswall v. Greenville Railroad Co., 3 Jo. Eq., 183.

The only question, therefore, is this: Did the defendant corporation have the power under its charter, or act of 20th December, 1866, to issue the bonds sued on in this action?

The bonds are made payable in the ordinary obligatory clause on the 1st day of November, 1900, being thirty years after their date. These words, before quoted, are then added: "In case of the non-payment of any coupon in full upon presentation and demand of payment thereof, when due at the said bank, and default of payment thereof shall continue for six months after such presentation and demand, then the principal of this bond shall become due and payable as provided in the deed of trust or mortgage made to secure the payment thereof, as though the whole period of thirty years had elapsed."

These words evidently refer to the obligation intended to be assumed

by the obligor, and must form a part of such obligation. And reference is made to the mortgage—which is the security given cotemporaneously with the obligation to secure its performance—for a full expression of the meaning and intent of this part of the obligation. To ascertain, therefore, the true intent and meaning of the parties, the bond and mortgage must, as to this part, be read together. Construed in this way, it will clearly appear that these words form a material and important part of the contract which the obligor entered into with the obligee.

It is true that the initiatory words: "In case of," are frequently
190 used as words of condition, or may introduce a condition, other words being added to give them full effect. But here it is evident no condition as applicable to the obligation was intended. There are wanting the requisites which the authorities say are necessary to create a condition, which are: 1st. The clause in which the words occur has no dependence on another clause in the deed, &c.; 2d. They must be words of the grantor intended to impose some obligation on the obligee, &c.; and, 3d. Must apply to the donee or grantee and in some way effect the estate or grant to him. (Sheppard's Touchstone, 121, 122; 15 Penn. State, 307, 308.)

None of these qualities exist here. On the contrary, these words impose a burden on the obligor, and confer a further right on the obligee if the covenant of the obligor be not complied with. Instead, then, of being words of condition intended to affect the rights of the obligee, they create a covenant on the part of the obligor whereby he binds himself to something besides the mere covenant to pay the principal of the said bonds at the expiration of thirty years, and the interest semi-annually during that period. See Sheppard's Touchstone, 1st vol., 121, 122; Paschall v. Passmore, 15 Penn. St., 295, 307, and cases cited in these authorities.

This construction disposes of much that was contended for in the argument before the commissioner, and if this point is made good, then the principal of the bonds is payable in thirty years in any event, and may become payable at a much shorter period. In fact the plaintiff contends that it did become payable at the expiration of less than two years. So that the question narrows itself down to this: Can a railroad corporation having power to issue bonds which shall not mature at an earlier period than thirty years issue bonds which may, and in fact do, become payable in less than two years? It would seem that to ask the question is to answer it. It will not readily be believed that the legislature having refused to grant power to the corporation to make its bonds payable, in express terms, in less than thirty years, has, in the same law, given it authority so to surround its contract with conditions that the prohibited act is legally effected.

191 The commissioner has considered it as settled that if these bonds had been payable on their face in less than thirty years, they would have been "ultra vires" and void. He is unable to perceive any difference in principle between such bond and those now sued on. White v. Franklin Bank, supra; Commonwealth v. Smith, supra; Pearce v. Madison, &c., R. R. Co., supra; Bank of U. S. v. Owens, 2 Peters, 527; 3d McL., 102; Root v. Wallace, 4 McL., 8; A. & A. on Corps., 257, cases in note.

If the contract were capable of being apportioned, possibly *possibly* the court might disregard the illegal part and execute such as was legal. The commissioner, however, is of opinion that the contract is entire and cannot be apportioned. White v. Brown, 2 Jones, 403; Niblett v. Her-

ring, 4 Jones, 262; 2 Parson on Contracts, 520, sec. 5, and cases cited in notes to that section.

All of which is respectfully submitted.

JOSEPH B. BATCHELOR,
Commissioner, &c.

192 And on the 13th day of January, 1874, the complainant files exceptions to the report of the commissioner, as follows:

Circuit court of the United States for the 4th circuit and eastern district of North Carolina, in equity.

HENRY W. HOWELL, COMPLAINANT,
and
THE WESTERN RAILROAD COMPANY AND others, defendants.

Exceptions taken by the said Henry W. Howell, complainant, to the report of Joseph B. Batchelor, esquire, commissioner, to whom the said cause was referred by order of said circuit court at June term, A. D. 1873.

1ST EXCEPTION. For that the said commissioner hath in and by his said report found as a fact, in paragraph xxxiv thereof, that the debt of the Western Railroad Company is $97,894, whereas said commissioner should have found the debt of the W. R. R. Co. was $451,000.

2ND EXCEPTION. Said commissioner has found in paragraph xxxvi of his said report that the Western Railroad Company is not insolvent, when he should have found that said company is insolvent.

3RD EXCEPTION. For that said commissioner has found and
193 determined as matter of law, in paragraph iii, page 12 of said report, that the W. R. R. Co. did not have authority to mortgage its franchise, whereas he should have found and determined that said company did have authority to mortgage its franchise.

4TH EXCEPTION. For that said commisssioner has found and determined and adjudged as matter of law, in paragraph iv, page 12 of his said report, that the act of 20th Decr., 1866, being accepted by the company, &c., is an implied repeal of the act of 1856 and '57, and of secs. 23 and 24 of the act of 1852, whereas he should have adjudged and determined that there was no such repeal, but that all of said acts were in full force at the time of making said mortgage and issuing the bonds sued on and secured thereby.

5TH EXCEPTION. For that the said commissioner has found, determined, and adjudged as matter of law that the W. R. R. Co. had not power to issue the bonds which are the subject of this suit, and to make the said mortgage to secure the same, and that the issuing of said bonds and making of said mortgage to secure the same is "ultra virĭes," whereas he should have adjudged and determined that the issuing of the said bonds was fully authorized, and that said bonds and the mortgage to secure the same were valid and binding upon said company, so far as complainant, a bona-fide holder of said bonds, concerned.

Wherefore complainant most humbly appeals from the findings and adjudications of said commissioner to the judgment of this honorable court.

HENRY W. HOWELL, *Complainant,*
By MERRIMON, FULLER AND ASHE,
Solicitors.

194 *Exceptions by the defendant, The Western Railroad Company, to the report of the commissioner, filed April 24th, 1874.*

Circuit court of the United States, fourth circuit, in equity.

The defendant, The Western Railroad Company, excepts to the report and finding of the referee, and assigns the following causes of exception, to wit:

I. For that the referee, in paragraph 6 of his report, finds the action of the stockholders authorizing the loan and mortgage to be valid and effectual in law.

II. For that the referee finds, in paragraph 7, the issue of the bonds of the defendant, of which those claimed by plaintiff are part, to be warranted by law, and the mortgage made to secure the same valid and binding upon defendant.

III. For that the referee finds that by virtue of said mortgage, in paragraph 11, the franchises and rights of defendant are vested in the trustees named therein.

IV. For that the referee, in paragraph 25, finds that there is no evidence that at the time the five bonds were delivered to H. J. Rogers, as trustee, by A. J. Jones, as president of the company, the said Rogers had notice of fraud and illegality in the issue of the bonds and
195 the making said mortgage.

V. For that the referee finds, in paragraph 26, that the plaintiff is the owner and holder of the bonds alleged to belong to him, bona fide, and without notice of fraud, irregularity, and illegality in the issue of the same.

VI. For that the referee, in paragraph 34, has overestimated the debt *the debt* of defendant, by including therein the bonds delivered to McAden and Rogers as trustees, and a sum, to wit, $44,250, claimed by L. P. Bayne & Co. as commissions on bonds not sold or disposed of, and which is part of the sum, to wit, $71,894, claimed by that firm, whereas the true debt of the defendant does not exceed the sum of 44,000 dollars.

VII. For that the referee undervalues largely the property, as appears upon the evidence.

And defendant further excepts to the ruling of the referee upon the matters of law, and for cause of exception saith:

I. That the authority was not given by law and the action of the stockholders at their meeting for the making and issuing the bonds and executing the mortgage set out in the pleadings.

II. That defendant is not precluded from showing fraud and illegality therein in this suit.

III. That the plaintiff is not a bona-fide holder of his said bonds.

SMITH & STRONG,
JAS. C. MACRAE,
Sols. for Defdt. The W. R. Rd. Co.

196 And afterwards, to wit, at rule-day, the first Monday of June, 1874, on motion of counsel, it is ordered that this cause be set down for hearing.

And at the next term of the said court, to wit, June term, 1874, the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, presiding, a decree is filed and entered in this cause on the 17th day of June, which said decree is in the following words and figures, to wit:

Final decree. ry 18,

In the United States circuit court, eastern district of North Carolina, June term, 1874, in equity.

HENRY W. HOWELL, FOR HIMSELF AND OTHERS,
against
THE WESTERN RAILROAD COMPANY AND OTHERS, defendants. } No. 44.

This cause coming on to be heard upon the report of the referee, with the evidence accompanying the same, and exceptions of com-
197 plainant and defendant, The Western Railroad Company thereto, and being debated by counsel, the fourth and fifth exceptions of defendant are sustained, and the court doth adjudge and decree that neither was the said Henry J. Rogers, from whom the complain't obtained possession of the bonds in the bill of complaint described, nor is the complainant, Henry W. Howell, a bona-fide holder of the same, and the said complainant is not entitled to any relief against the defendants in respect thereto, and that his bill be dismissed, with costs.

M. R. WAITE,
Chief-Justice, &c.

From this decree the complainant prays an appeal to the Supreme Court of the United States; which is allowed. Notice of appeal is waived. Amount of appeal-bond is fixed by the court at five hundred dollars.

And on the 14th day of August, 1874, the complainant files in the office of the said court his appeal-bond; which is in the words and figures following, to wit:

198 *Appeal-bond.*

Supreme Court of the United States of America.

HENRY W. HOWELL AND OTHERS, PLAINTIFFS,
against
RUFUS Y. MCADEN, THOMAS S. LUTTERLOH, Henry J. Rogers, The Western Railroad Company, John D. Williams, Henry Lilly, Edmund J. Lilly, Alfred A. McKeithan, Augustus W. Steel, and Isaac B. Grainger, defendants. } In equity.

Know all men by these presents that we, G. Rosenthal and William F. Askew, of the city of Raleigh, in the county of Wake, and State of North Carolina, are held and firmly bound unto Rufus Y. McAden, Thomas S. Lutterloh, Henry J. Rogers, The Western Railroad Company, Edmund J. Lilly, Henry Lilly, John D. Williams, Alfred A. Mc-
199 Keithan, Augustus W. Steel, and Isaac B. Grainger, defendants in the above-entitled cause, in the sum of five hundred dollars, ($500,) to which payment, well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 13th day of August, A. D. 1874.

Whereas the above-named Henry W. Howell and others, plaintiffs in

sue full certificates of stock to the amount of three-fourths of the
205 actual payments made by any stockholder upon application of such stockholder.

ARTICLE 12. All by-laws heretofore adopted by this company ar' hereby repealed.

206 UNITED STATES OF AMERICA,
Eastern District of North Carolina, ss:

I, N. J. Riddick, clerk of the circuit court of the United States for the said district, do hereby certify the foregoing contains a full, true, and perfect transcript and exemplification (with references to Exhibit A filed with the bill of complaint) of the record of said court, wherein Henry W. Howell and others are complainants, and Rufus Y. McAden, Thomas S. Lutterloh, Henry J. Rogers, The Western Railroad Company, John D. Williams, Henry Lilly, Edmund J. Lilly, Alfred A. McKeithan, August W. Steel, and Isaac B. Grainger are defendants, as the same remain of record and on file in the office of said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office, in Raleigh, this 8th day of October, A. D. 1874, and in the ninety-eighth year of the Independence of the United States.

[SEAL.] N. J. RIDDICK, *Clerk.*

(Indorsement on cover:) No. 205. Henry W. Howell et al., appellants, vs. Rufus Y. McAden, Thomas S. Lutterloh, Henry V. Rogers, The Western Railroad Company, et al. E. North Carolina C. C. U. S. Filed 21st October, 1874.

Transcripts

Records

876

276

Supreme Court of States

Dec Alte.

467 — 498

4-467

IN THE

SUPREME COURT

United States,

R TERM, A. D. [illegible].

MORTON, BLISS & CO., and THOMAS A. SCOTT, and HUGH J. JEWETT, Trustees, et al.

—vs.—

GILMAN, CLINTON & SPRINGFIELD RAILROAD COMPANY, Parties below.

FRANCIS E. HINCKLEY, Receiver, and so-called Appellant.

} In Chancery.

PHILADELPHIA BAR ASSOCIATION

Motion to Dismiss for want of Jurisdiction.

R. BIDDLE ROBERTS, and

R. E. WILLIAMS,

Of Counsel.

CHICAGO:

Beach, Barnard & Co., Legal Printers, 98 Randolph Street.

1877.

IN THE

SUPREME COURT

Of the United States,

OF OCTOBER TERM, A. D. 1876.

MORTON, BLISS & CO., and THOMAS A. SCOTT, and HUGH J. JEWETT, Trustees, et al.

—vs.—

GILMAN, CLINTON & SPRINGFIELD RAILROAD COMPANY, Parties below.

FRANCIS E. HINCKLEY, Receiver, and so-called Appellant.

} In Chancery.

Motion to Dismiss for want of Jurisdiction.

R. BIDDLE ROBERTS, and

R. E. WILLIAMS,

OF COUNSEL.

CHICAGO:

BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.

1877.

In the Supreme Court of the United States,

Of October Term, 1876.

Levi P. Morton, George Bliss, George S. Bowdoin, Thomas A. Scott, Hugh J. Jewett, Walter Watson, Joseph King, J. Stroem, G. H. DeMarez Oyens, Geb. Van Wyck, R. Daniel Molterbeck, H. G. Oyens, A. Von Nellestyne, De Feutsche Bankvereing, F. B. Coninck Liefsting, J. J. H. Van Eeghen, George F. Swethenham, George Smith, Annie More McEwan, Richard Ellerton, Thomas A. Bell, J. B. Rowe, A. W. Gilman, J. D. Lamb, William Younger, H. Thomson, J. Montgomerie Craig, John B. Frith, W. Boissevain, J. J. Hibblethwaite, W. Endicott, Hugh Williams, C. J. H. Allen, John Paxton, W. Mitchell James, John Middleton, John H. Tilly, Eustace G. Cecil, George W. Sanford, G. W. Carew, Philip Rose, Robert Hayward, Archibald Walker, Cunningham Baron Boethwick, Andrew Wark, John Wark, Alfred Rosling, C. M. Bissell, Nathaniel Worsdell, Percy Chaplin, James Baird, John Bruce, William Arnot, Arthur Johnson, Archibald Stumick, William Somerville, Jr., Edw. Sturdy, W. Young, Samuel Pearce Hope, Thomas Arthur Hope, Unwin Heathcote, Thomas Wright, Thomas Sutton, R. Charles Lowndes, Hannah Lowndes, A. D. DeMarez Oyens, Charles H. Lowe, Robert Howie, John Rose, Oscar du Pre Grunfell, George Milne, Charles Day Rose, Henry Viner, William Somerville, James Hislop Powell, Archibald Kelso, R. S. Johnson, Charles Douglas, Mary Wakefield Cropper, John Cropper, Edward Cropper, W. J. Brown, J. Lindsay Scott, Julia Du Pre, Louisa Du Pre, Gertrude Du Pre, Fanny Du Pre, J. Ramsay L'Arny, F. Maxwell, A. G. Dallas, Edwin Prince, John Edward Walker, H. T. Thomson, Thomas A. Bush, E. H. Jessop, Hugh Wright, Robert Brown, P. A. Ermens, Jane H. Hudson, Alexander F. Lory, H. Trevethick, Andrew Forsyth, William Charlesworth, George Rawson, Eustace Henry Bronlow, Gascoyne Cecil, R. B. Fenwick, George T. Mitchell, Samuel James Arnold, Henry Crosfield, William Crosfield, John Johnson, A. Kinnaird, Richard Palin, John Peiser, James Pilkington, James Proctor, Joseph Redman, William Robinson, George Sanders, William Shilson, and Louisa Timbrell,

In Chancery.

—vs.—

Gilman, Clinton and Springfield Railroad Company, parties below, and Francis E. Hinckley, Receiver, and so-called appellant.

And now, to wit, February 19th, A. D. 1877, come R. Biddle Roberts and R. E. Williams, solicitors for defendants in error, and plaintiffs below, and move this Honorable Court to dismiss this case, for want of jurisdiction, notice of which motion was served upon Francis E. Hinckley, *the Receiver in this case, and so-called appellant*, and his solicitors, on the 27th day of January, A. D. 1877.

STATEMENT.

This cause, in which the Bill was originally filed in the Circuit Court of McLean County, Illinois, was removed to the Circuit Court of the United States for the Southern District of Illinois, in December, 1875, and on the 8th day of April, A. D. 1876, a final decree was entered, by virtue of which, on the 10th day of June, 1876, the railroad was sold, purchased by the bondholders, through Trustees, and is now owned and held by them. From that final decree the defendant Company, the Gilman, Clinton and Springfield Railroad Company, did not pray an appeal, or take any steps in that direction, and the record shows that the case was fully completed and ended, so far as they are concerned.

Francis E. Hinckley, who was the Receiver appointed by the State Court, having made a report to the Circuit Court of the United States, for the Southern District of Illinois, which report had been referred to a Master, reported upon by the Master; exceptions argued, and a balance found to be due against him, was on the 27th of September, 1876, ordered and decreed to pay the said balance into court on or before the 10th day of October, 1876, and on the 9th of October he, Francis E. Hinckley, *the Receiver*, prayed an appeal, and on the 11th of November, 1876, brought to this Court the entire record in the case above stated, and has, (we believe), *had ~~in~~ the case so docketed as to make himself a party.*

On the 27th day of November, A. D. 1876, a motion to dock-

et and dismiss under the 9th Rule, was made, for want of security for costs. This Court allowed them two weeks to enter the security required by the rule, which having been done, the case has been docketed; and docketed in the way above stated.

Francis E. Hinckley, it is proper to say, has never been a party to this suit, and at the time of the entry of the final decree, April 8th, 1876, there was no party defendant, save the Railroad Company, nor had any others intervened.

Vide Certificate of the Clerk of the Circuit Court for the Southern District of Illinois, as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES, } ss.
Southern District of Illinois.

Levi P. Morton, George Bliss, George S. Bowdoin, Thomas A. Scott, Hugh J. Jewett, Walter Watson, Joseph King, J. Stroem, G. H. DeMarez Oyens, Geb. Van Wyck, R. Daniel Molterbeck, H. G. Oyens, A. Von Nellestyne, De Feutsche Bankvereing, F. B. Coninck Liefsting, J. J. H. Van Eeghen, George F. Swethenham, George Smith, Annie More McEwan, Richard Ellerton, Thomas A. Bell, J. B. Rowe, A. W. Gilman, J. D. Lamb, William Younger, H. Thomson, J. Montgomerie Craig, John B. Frith, W. Boissevain, J. J. Hibblethwaite, W. Endicott, Hugh Williams, C. J. H. Allen, John Paxton, W. Mitchell James, John Middleton, John H. Tilly, Eustace G. Cecil, George W. Sanford, G. W. Carew, Philip Rose, Robert Hayward, Archibald Walker, Cunningham Baron Boethwick, Andrew Wark, John Wark, Alfred Rosling, C. M. Bissell, Nathaniel Worsdell, Percy Chaplin, James Baird, John Bruce, William Arnot, Arthur Johnson, Archibald Stumick, William Somerville, Jr., Edw. Sturdy, W. Young, Samuel Pearce Hope, Thomas Arthur Hope, Unwin Heathcote, Thomas Wright, Thomas Sutton, R. Charles Lowndes, Hannah Lowndes, A. D. DeMarez Oyens, Charles H. Lowe, Robert Howie, John Rose, Oscar du Pre Grunfell, George Milne, Charles Day Rose, Henry Viner, William Somerville, James Hislop Powell, Archibald Kelso, } In Chancery.

R. S. Johnson, Charles Douglas, Mary Wakefield Cropper, John Cropper, Edward Cropper, W. J. Brown, J. Lindsay Scott, Julia Du Pre, Louisa Du Pre, Gertrude Du Pre, Fanny Du Pre, J. Ramsay L'Arny, F. Maxwell, A. G. Dallas, Edwin Prince, John Edward Walker, H. T. Thomson, Thomas A. Bush, E. H. Jessop, Hugh Wright, Robert Brown, P. A. Ermens, Jane H. Hudson, Alexander F. Lory, H. Trevethick, Andrew Forsyth, William Charlesworth, George Rawson, Eustace Henry Bronlow, Gascoyne Cecil, R. B. Fenwick, George T. Mitchell, Samuel James Arnold, Henry Crosfield, William Crosfield, John Johnson, A. Kinnaird, Richard Palin, John Peiser, James Pilkington, James Proctor, Joseph Redman, William Robinson, George Sanders, William Shilson, and Louisa Timbrell,

—vs.—

Gilman, Clinton and Springfield Railroad Company.

I, J. A. Jones, Clerk of the Circuit Court of the United States, in and for said Southern District of Illinois, do hereby certify that the foregoing is a true and correct title of a cause on the Chancery side of said Court, recently certified by me into the Supreme Court of the United States. And I do further certify that since the order of February 15, 1876, dismissing bill as to all defendants except the aforesaid Railroad Company, the parties complainant and defendant appear of record in my said office, as before stated—none other having intervened.

In witness whereof, I have hereunto set my hand and seal of said Court, at Springfield in said District, this sixteenth day of November, A. D. eighteen hundred and seventy-six.

[SEAL OF COURT.] J. A. JONES, *Clerk.*

OBJECT OF THE MOTION.

We respectfully ask this Honorable Court to dismiss this case for want of jurisdiction, for the reason that Francis E. Hinckley, the Receiver, who prays the appeal, is not a party to the suit, and cannot be.

A Receiver cannot properly appeal. "Being merely the officer "or representative of the Court without personal interest or "personal rights in the litigation, the right to discharge him "rests with the Court, at any stage of the controversy, and "from the exercise of this right he cannot appeal."

High on Receivers, page 536.

"A Receiver has no rights whatever. He is but an officer "of the Court."

In re Colvin, 3d Md. Chy., page 300.

Same doctrine affirmed in

Ellicott v. *Warford*, 4th Md., page 80.

"Only those who are parties to the record can sue out the "writ of error."

Phillips' Practice, page 64, and cases there cited.

The same rule applies to appeals.

Id. page 65.

Clearly, in this case, the final decree was entered April 8, 1876. From it no appeal was prayed, and under the opinion of this Court in *Kitchen* v. *Randolph*, No. 777, Oct. Term, 1876, no appeal could be taken in the October following, much more than the sixty days having elapsed.

In addition to which the decree of September 27, 1876, was only a decree requiring the payment of money into Court, was merely interlocutory, transferring the possession of property in litigation, to which the rule of finality could not apply.

Forgay v. *Conrad*, 6 Howard, p. 201.

This doctrine is sustained by

7 Wall., 342,

Railroad Co. v. *Bradley*, 7 Wall., 577,

Stowall v. *Banks*, 10 Wall., 583,

and would seem to be the settled law, as it now stands.

Certainly gross injustice to the real parties in interest to this suit will be done by permitting this appeal to lie ; the practical effect of which is to keep in litigation, property which actually sold at the Master's sale for $1,500,000, while the question here now for settlement is only one between the Court and its Receiver for an amount relatively so small. Two years may elapse before a final argument, and no real party in interest before the Court. It is respectfully submitted that such a course will not receive the sanction of this Court.

R. BIDDLE ROBERTS,
R. E. WILLIAMS,
Of Counsel.

947

IN THE

SUPREME COURT OF THE UNITED STATES,

OF OCTOBER TERM, A. D. 1876.

IN THE MATTER OF THE APPEAL OF FRANCIS E. HINCKLEY FROM A DECREE OF THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, IN THE CASE OF

PHILADELPHIA BAR ASSOCIATION

MORTON, BLISS & CO., AND THOMAS SCOTT, AND HUGH J. JEWETT ET AL.

—*vs.*—

GILMAN, CLINTON & SPRINGFIELD RAILROAD COMPANY.

ON MOTION TO DISMISS THE APPEAL.

CRAWFORD & McCONNELL, FOR APPELLANT.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.
1877.

IN THE

SUPREME COURT OF THE UNITED STATES,

OF OCTOBER TERM, A. D. 1876.

IN THE MATTER OF THE APPEAL OF FRANCIS E. HINCKLEY FROM A DECREE OF THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS, IN THE CASE OF

MORTON, BLISS & CO., AND THOMAS SCOTT, AND HUGH J. JEWETT ET AL.

—*vs.*—

GILMAN, CLINTON & SPRINGFIELD RAILROAD COMPANY.

STATEMENT AND ARGUMENT.

On the 7th day of July, 1873, Joseph J. Kelley commenced proceedings in the Circuit Court of McLean County against the Gilman, Clinton and Springfield Railroad Company.

In this suit, Francis E. Hinckley was appointed Receiver, and, as such, took possession of the railroad property. Pursuant to the order of the Court, he gave bond, with sureties, in the penal sum of $,500,000, conditioned upon the faithful performance of his duty as Receiver.

Subsequently, on the day of September, 1874, Levi P. Morton, *et al.*, residents, some of them, of different States of the Union, and others of them aliens and

residents of foreign countries, by leave of the Court, instituted suit in the Circuit Court of McLean County, against the same Railroad Company, *et al.*

The complainants, in their bill, prayed that Hinckley might be continued as their Receiver, and accordingly an order was entered appointing Hinckley as Receiver, and directing him to act as Receiver in both causes.

Subsequently Hinckley was removed from the receivership in both suits, and the property placed in the possession of Thomas Scott and Hugh J. Jewett, trustees, under the mortgage which the complainants, in the second suit, were seeking to foreclose.

On the 23d day of November, 1875, the complainants in this second suit filed a petition therein, directed to the Circuit Court of McLean County, praying for an order transferring the cause into the Circuit Court of the United States for the Southern District of Illinois.

This application for removal was refused, and thereupon the complainants took a certified copy of the record of this cause, and filed the same in the Federal Court, in which court the complainants proceeded with their case to final decree.

The suit in which Hinckley had been originally appointed Receiver remained in the McLean County Circuit Court. Hinckley's accounts were still unsettled at the time of the removal of the Morton suit, and no discharge of any kind was ever entered in the Kelley suit of Hinckley and his sureties.

After the entry of the final decree by the Federal Court in the Morton suit, the complainants moved for an order directing Hinckley to file an account. This order was entered, and Hinckley, although protesting that he was under the jurisdiction of another court as to his accounts, and responsible in another case, complied with the order

and rendered his account. To this the complainants excepted, and on their motion the account was referred to a special master to examine, take evidence on, and report.

The special master proceeded under the reference, and made report to the Court that Hinckley should be allowed, as compensation, $5,000 a year, but should be charged with certain items which, according to the special master, should not have been paid, and with interest at the rate of six per cent. on monthly balances which had been in his hands while Receiver, and deposited to his private account. To this report Hinckley excepted upon the ground, that the Court had no jurisdiction of the case—no jurisdiction of him; that he was the Receiver of another court in another case; that he could not be charged with interest, and that the compensation was too low.

The report was, however, confirmed, and an order entered directing Hinckley to pay into Court, on or before the 10th day of October, 1876, the sum of $18,776.25, with costs of the reference. From this order, Hinckley prayed an appeal, which was granted, and bond was filed and approved.

The appeal so taken involves important questions :

1. As to whether the case could have been removed from the McLean County Circuit Court; and if it could,

2. Whether it were properly removed, so that the Federal Court ever had jurisdiction of it.

3. Whether the Federal Court even, if the Morton case were properly removed, had jurisdiction of Hinckley to compel him to account and to pay over moneys which came into his hands as Receiver of a State Court in another case.

4. Whether the Federal Court, having jurisdiction of the Morton case, could charge Hinckley with interest on balances which were in his hands before the institution of the Morton suit as Receiver in the Kelley case.

At this time it is only necessary to suggest, in relation to the jurisdiction of the Federal Court, that the Morton suit was not a "controversy wholly between citizens of "different States," as there were also *aliens* who were parties to the cause. "And then the section proceeds to "say: 'And when in any suit mentioned in this section "'there shall be a controversy which is wholly between "'citizens of different States, (*that means different States* "'*of this Union—not citizens of the one of the States of this* "'*Union, and foreign States' citizens or subjects;* and the "'suits referred to are the suits which can be fully deter-"'mined as between them,) either one or more of the "'plaintiffs actually interested in such controversy may "'remove such suit.'" Per DRUMMOND and TREAT, JJ.

Henry Hersey et al. v. *Illinois Midland Railroad Co.*, Chicago Legal News, May 20th, 1876, p. 274.

It is contended here that we have no right to appeal, because Hinckley, the appellant, was not a party to the main suit. But no such unjust rule prevails. Appeals have been allowed by this Court,

To a bidder who petitioned to have a sale confirmed to him,

Blossom v. *R. R. Co.*, 1 Wall., 655,

and to a bondholder who intervened for his protection,

Crawshay v. *Soutter*, 6 Wall., 739.

Hinckley is entitled to an appeal from the order against him independently of the other suit, for the reason that it is in all respects tantamount to a judgment, and works as grievously against him as if he had been an original party to the suit.

The proceedings against him stand by themselves, and amount to the same thing as if the complainants had commenced a separate suit for money improperly withheld rom them.

A court of which he had never been the receiver or officer in any way proceeds summarily and in an extraordinary way and enters a decree against him for a large sum of money, and charges him with the costs of the proceedings.

It cannot be that the right of appeal shall be determined by the mere form of the proceeding. An inferior court could tolerate, and perhaps might encourage all kinds of incidental proceedings, such as those under discussion, for the mere purpose perhaps of avoiding a review of its determinations, if the mere form of proceedings shall regulate the right of appeal to this Court.

Under a proceeding such as the one appealed from, or under one like it, a man may be decreed to pay into court, or turn over to some one designated, the whole of his fortune; and if an appeal is denied to him because he is not an original party to the suit, he would be helpless and remediless. A very little ingenuity on the part of counsel and a willing court would deprive an individual of an opportunity to review here, the errors or the worse than errors, which might characterize the judgments and decrees of the Circuit Courts.

The Honorable Judge of the Circuit Court appreciated the full force of this argument when he allowed an appeal from his judgment to this Court at the prayer of the appellant.

The same reasons for sustaining the appeal against the objection that appellant was not a party, apply with equal force to the objections that the appeal was not taken by the appellant until more than sixty days after the entry of the final decree in the main cause, and that the order was merely interlocutory.

A mere statement of the first of these two objections is a sufficient answer to it, and an argument to support the

appeal. If the appellant otherwise had a right to an appeal, it cannot be lost simply because the judgment was not entered against him until more than sixty days after the entry of final decree in the main case. The appeal is not from the decree in the main case, but from the decree against the appellant. He never had any right to an appeal from the other decree, and no grievance for the review of this Court until the judgment against himself, and from this he appealed promptly.

The decree against the appellant was more than merely an interlocutory decree. As to him, the decree is final, and has all the elements of final judgment, including an award for the costs. It can be enforced by the process of the court, and the appellant is liable to attachment unless he obeys it.

It is true, in our practice, that an appeal cannot be taken from a decree which is simply preparatory to the final hearing of a cause ; but here, the hearing had been had, and the final decree entered, and the main cause practically out of court.

It is not true that an interlocutory order may not be reviewed, for it might operate as grievously as the final decree against a party, but that no appeal may be taken in the case until the final decree is entered, and then the whole proceedings may be looked into, and all errors corrected by the appellate court.

Forgay v. *Conrad*, cited by counsel, 6 How., 201, is simply to the effect that an appeal cannot be taken from an interlocutory decree entered before the final decree in the case.

" In limiting the right of appeal to final decrees, it was " obviously the object of the law to save the unnecessary " expense and delay of repeated appeals in the same suit;

" and to have the whole case and every matter in con-
" troversy in it decided in a single appeal."

Forgay v. *Conrad*, 6 How., 205.

This is the reason of the rule which denies an appeal from an interlocutory order when entered, and the rule is not that no appeal may be had at all from such an order.

But the decree against the appellant we do not regard as interlocutory, but as final, from which he is entitled to an appeal, as much as if the decree had been entered in a separate suit involving no other matter, and to answer, which he had been summoned regularly.

The remaining objection of counsel to the appeal is, that the appellant was the Receiver of the Circuit Court, and for that reason entitled to no appeal.

This objection has, perhaps, been already met in the statement of the case. The appellant was never the Receiver of the United States Court.

He was appointed by the McLean County Circuit Court, as Receiver in another case, in which he qualified, and was only formally and never actually Receiver in the case removed to the Federal Court.

He was removed from the receivership in both cases previous to the transfer of the second suit into the United States Court.

This state of facts will appear from an examination of the record.

Even if it were a fact that the appellant had been the Receiver in the case which went into the Federal Court, and in which this decree against him was entered, we believe he would be entitled to an appeal.

If not, it is within the power of the Circuit Court, not only to charge him with interest, as it has in this case, on money in his hands, before the institution of this suit, by

virtue of his office under the appointment of another court in another case, but to charge him with interest on his own fortune, with rent on his own property, and the determination of the Circuit Court, whether the result of mere error, or something worse, could not be reviewed. It is possible that he would have no right to an appeal from an order or decree of this kind before final decree in the main cause, but it cannot be that he would have no right of appeal at any time.

In re Colvin, 3 Md. Ch., 300, cited by counsel, the question involved was one arising under the laws of Maryland, and the decision arrived at was owing principally to the construction placed upon these laws by the Court. It was an appeal by the Receiver from an order entered discharging and directing him to turn over property in which he confessed (page 305) that he had no interest. His compensation or accounts were not in question, and the Court almost says if they had been, the case would have been different (page 303). And the appeal was taken from the order before the final decree in the case. The Court proceeds upon the ground that the proceedings, except where his own accounts and allowances are concerned, are as to the receiver *res inter alios acta*, (page 303).

Ellicott v. *Warford*, 4 Md., 80, is the same case in the Court of Appeals.

The case of *N. A. Cowdrey* v. *The Galveston, Houston and Henderson R. R. Co.*, No. 85, October Term, 1876, was an appeal taken by the Receiver from a decree which denied him credit for certain expenditures, and charged him with the same.

This appeal was entertained, and an opinion has been recently filed in the cause, which deals exclusively with

the merits of the case, and does not hint that the Receiver had no right to the appeal.

This case alone is sufficient authority to support appellant's right of appeal, even had he been, as the record shows he never was, the Receiver of the Circuit Court.

This case should be heard on its merits, as very important jurisdictional questions are involved, and so much doubt exists as to the jurisdiction of the Federal Court, that the State Court still holds the case, and claims that it is still pending in that court.

If the appeal should not be allowed, a very grievous injustice would be done the appellant, and a rule established which, in its application raises the Circuit Court superior to this one.

The right of appeal is one that ought not to be limited, as in it lies all the relief that an individual may have from the erroneous decrees and judgments of the inferior courts. It ought rather to be allowed whenever it can be, for it is only under the menace of an appeal that we may expect from judges of the lower courts in all cases, calm consideration of, and industrious attention to the rights of the parties brought before them.

Respectfully submitted,

CRAWFORD & McCONNELL,

For Francis E. Hinckley, Appellant